S. HRG. 103–1082

INTERNATIONAL TRUSTBUSTING— EXCHANGING INFORMATION WITH FOREIGN ANTITRUST AUTHORITIES

RING

 RE THE

SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

S. 2297

A BILL TO FACILITATE OBTAINING FOREIGN-LOCATED ANTITRUST EVIDENCE BY AUTHORIZING THE ATTORNEY GENERAL OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION TO PROVIDE, IN ACCORDANCE WITH ANTITRUST MUTUAL ASSISTANCE AGREEMENTS, ANTITRUST EVIDENCE TO FOREIGN ANTITRUST AUTHORITIES ON A RECIPROCAL BASIS; AND FOR OTHER PURPOSES

AUGUST 4, 1994

Serial No. J–103–69

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

23–611 CC WASHINGTON : 1996

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-052494-6

S. HRG. 103–1082

INTERNATIONAL TRUSTBUSTING—EXCHANGING INFORMATION WITH FOREIGN ANTITRUST AUTHORITIES

RING

 RE THE

SUBCOMMITTEE ON ANTITRUST,
MONOPOLIES AND BUSINESS RIGHTS
OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

S. 2297

A BILL TO FACILITATE OBTAINING FOREIGN-LOCATED ANTITRUST EVIDENCE BY AUTHORIZING THE ATTORNEY GENERAL OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION TO PROVIDE, IN ACCORDANCE WITH ANTITRUST MUTUAL ASSISTANCE AGREEMENTS, ANTITRUST EVIDENCE TO FOREIGN ANTITRUST AUTHORITIES ON A RECIPROCAL BASIS; AND FOR OTHER PURPOSES

AUGUST 4, 1994

Serial No. J–103–89

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
23–611 CC WASHINGTON : 1996

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-052494-6

COMMITTEE ON THE JUDICIARY

JOSEPH R. BIDEN, JR., Delaware, *Chairman*

EDWARD M. KENNEDY, Massachusetts
HOWARD M. METZENBAUM, Ohio
DENNIS DECONCINI, Arizona
PATRICK J. LEAHY, Vermont
HOWELL HEFLIN, Alabama
PAUL SIMON, Illinois
HERBERT KOHL, Wisconsin
DIANNE FEINSTEIN, California
CAROL MOSELEY-BRAUN, Illinois

ORRIN G. HATCH, Utah
STROM THURMOND, South Carolina
ALAN K. SIMPSON, Wyoming
CHARLES E. GRASSLEY, Iowa
ARLEN SPECTER, Pennsylvania
HANK BROWN, Colorado
WILLIAM S. COHEN, Maine
LARRY PRESSLER, South Dakota

CYNTHIA C. HOGAN, *Chief Counsel*
CATHERINE M. RUSSELL, *Staff Director*
MARK R. DISLER, *Minority Staff Director*
SHARON PROST, *Minority Chief Counsel*

SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS

HOWARD M. METZENBAUM, Ohio, *Chairman*

DENNIS DECONCINI, Arizona
HOWELL HEFLIN, Alabama
PAUL SIMON, Illinois

STROM THURMOND, South Carolina
ARLEN SPECTER, Pennsylvania
ORRIN G. HATCH, Utah

GENE KIMMELMAN, *Chief Counsel*
THAD STROM, *Minority Chief Counsel and Staff Director*

CONTENTS

STATEMENT OF COMMITTEE MEMBERS

CHRONOLOGICAL LIST OF WITNESSES

ALPHABETICAL LIST AND MATERIAL SUBMITTED

APPENDIX

Proposed Legislation

Additional Submissions for the Record

INTERNATIONAL TRUSTBUSTING—EXCHANGING INFORMATION WITH FOREIGN ANTITRUST AUTHORITIES

THURSDAY, AUGUST 4, 1994

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, MONOPOLIES
AND BUSINESS RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:30 p.m., in room SR–385, Russell Senate Office Building, Hon. Howard M. Metzenbaum (chairman of the subcommittee), presiding.

Also present: Senator Thurmond.

OPENING STATEMENT OF HON. HOWARD M. METZENBAUM, A U.S. SENATOR FROM THE STATE OF KENTUCKY

Senator METZENBAUM. A Republican Senator from my own State of Ohio wrote the first antitrust law to protect American consumers from American cartels and monopolies, 104 years ago. Today that protection is not enough. American consumers are gouged and American businesses are ruined by price-fixing cartels and ruthless monopolies that operate overseas from abroad.

All too often our own antitrust enforcement agencies are forced to stand by helplessly because they cannot get the evidence they need to get to court. The International Antitrust Enforcement Assistance act will give them a new and effective law enforcement tool to get incriminating evidence and prosecute foreign cartels. It is only fair to point out that Senator Strom Thurmond and I have joined together on a number of bills since we have been in the Senate. We have not lost any of them, and we probably expect to pass this one.

The bill makes international antitrust prosecutions possible because it removes what the American Bar Association has described as, "the most significant obstacle to effective cooperation and coordination among international competition authorities."

It does so by allowing the Antitrust Division and the Federal Trade Commission to exchange evidence with their foreign counterparts. This exchange authority is modeled after a Securities and Exchange Commission law. Michael Mann, the SEC's Chief of International Affairs, will testify that exchange authority has made it easier for the SEC to prosecute foreign investors who violate our securities laws.

The way this bill works is quite simple. It allows the Antitrust Division and the Federal Trade Commission to help foreign antitrust authorities with their investigations if and only if they agree to help us with ours. It is a two-way street. We give information and assistance to get information and assistance. The bill also has strict safeguards to assure that exchanged U.S. business documents do not end up in the hands of foreign competitors.

The Antitrust Division and the FTC are required to operate under the terms of a public mutual assistance agreement. To be eligible to enter into an agreement, a foreign antitrust authority must, one, have confidentiality laws similar to our own and pledge to comply with those laws; two, return all exchanged information to the U.S.; and, three, take immediate and effective action if there is a leak.

The agreement can be cancelled immediately if it is misused, and there are other safeguards which prohibit national security and Hart-Scott-Rodino documents from being shared under any circumstances. I realize the bill creates some risk that sensitive business information may find its way into the wrong hands, but I have every confidence in the ability of our U.S. antitrust authorities to negotiate tough agreements with reliable foreign governments to minimize that risk.

Frankly, this bill is too important to let unreasonable fears bog it down. It has received broad support from Democrats and Republicans alike. I am pleased to say that not only is Senator Thurmond a cosponsor of this legislation, but my colleagues Ted Kennedy, Pat Leahy, Paul Simon, Alan Simpson, Arlen Specter and Chuck Grassley are all cosponsors. It has also been endorsed by James Rill, who was Antitrust Chief under President Bush, and by the Antitrust and International Sections of the American Bar Association, and, of course, it is understood that we will be hearing from the distinguished head of the Antitrust Department right after Senator Thurmond and I conclude our opening statements.

In my view, this bill is important because it gives American antitrust authorities another tool to bring international price-fixing cartels and abusive monopolies to justice. That means American consumers can look forward to lower prices and more choices on foreign products. The head of the Antitrust Division, Anne Bingaman, has done a yeoman job in making international antitrust enforcement a priority and she has certainly contributed much in connection with the development of this bill. I hope that my colleagues in this committee will all support it and we will pass it on the floor of the U.S. Senate in the not too far distant future.

Senator Thurmond.

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Thank you, Mr. Chairman. Mr. Chairman, I want to commend you for the work you have done on this bill. It is a very important piece of legislation. This hearing today concerns the International Antitrust Enforcement Assistance act which I support with Senator Metzenbaum and others. This bill authorizes closer cooperation and sharing of information between the United States and foreign antitrust authorities in order to more ef-

fectively enforce antitrust laws for the benefit of American consumers and businesses.

This is a worthy objective which deserves broad bipartisan support. I am pleased that half of the Republicans and half of the Democrats on the Judiciary Committee already have decided to support this legislation. It is indisputable that as business dealings have become more international in scope antitrust violations more often involve transactions and evidence which are located in more than one country. It is important for antitrust authorities to be given better tools for obtaining evidence abroad, and it is necessary for our Justice Department and Federal Trade Commission to be able to provide materials to foreign authorities in order to obtain the information that they need on a reciprocal basis. However, this legislation does not change the substance of either United States or foreign antitrust laws.

Initially, when Attorney General Reno and Assistant Attorney General Bingaman announced their intention to seek this legislation, I had serious concerns about the potential for misuse of information shared with foreign governments and other unintended consequences which could be detrimental to American interests. I worked with officials at the Department of Justice and am pleased to state that these concerns have been addressed in this legislation.

I want to commend General Reno and Assistant Attorney General Bingaman for their cooperation in addressing legitimate concerns of the business community. Mrs. Bingaman has been instrumental in bringing the need for this bill to our attention and furthering this legislation. Also, there has been bipartisan cooperation in both the House and the Senate in drafting this legislation.

In particular, a number of provisions were added to the original proposal to protect American interests and enhance the confidentiality of any information disclosed, including a requirement that the foreign laws must be sufficient to protect confidentiality and will be applied in each case. Moreover, the bill ensures that there will be true reciprocity between American and foreign antitrust authorities so that the benefits and the responsibilities are evenly shared. Finally, provisions were included to ensure that classified information relating to national defense and foreign policy will not be disclosed to foreign authorities.

Mr. Chairman, I look forward to hearing from each of the witnesses this afternoon and thank them for their time and effort in appearing before us. Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you, Senator Thurmond. I want to welcome Ms. Bingaman. I think frankly this is the first time that you have appeared before the subcommittee since your confirmation hearing which was over a year ago, and we are happy to have you back. Let me say publicly that I think you are doing an excellent job at the Antitrust Division, one that has not really been done for a good many years previous to your taking over.

I also want to commend you and thank you for your work on this bill, and for winning two important cases against international price-fixing cartels. We will be looking forward to your testimony and looking forward to continuing to work with you. Please proceed.

STATEMENT OF ANNE BINGAMAN, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE

Ms. BINGAMAN. Thank you, Senator. I am honored to be here today before the committee, and I want to express my sincere appreciation for your support, Mr. Chairman, and the support of Senator Thurmond, ranking Republican who just had to leave, and the tremendous work by the majority and minority staffs on this bill. It has been a wonderful bipartisan effort. It is a real tribute to the way the system can work when the interests of law enforcement and legitimate needs of those that this law will effect are seriously addressed and there is a serious bipartisan effort to meet the concerns.

I think we have done this and I am grateful for all the work we have had from both sides of the aisle, and that is evidenced by the support you listed from Senators Kennedy, Biden, Leahy, Simon and Senators Simpson, Grassley and Specter as cosponsors of this bill.

The dialog we have been engaged in which has resulted in the bill as introduced has been constructive, it has been thorough, it has included representatives of the business community, the bar, and we have all worked hard on it. I want to particularly thank my predecessor in this job, Assistant Attorney General Jim Rill in the Bush administration, who has been head of a special task force which has devoted hundreds of hours to this effort. He will testify later today, and I want to publicly thank him for all of the work that he personally has done and that the ABA has done. Alan Silberman, who is chair of the Antitrust Section of the American Bar Association, is also here in support of the bill, and we appreciate that very much.

Let me say that from the dialog and the work over the past several weeks and months that we have done, a broad consensus has emerged, a bipartisan consensus that antitrust enforcement in the international context is more important than ever. International trade now accounts for 25 percent almost of GDP. It is critically important to jobs, to exports, to American consumers, who may be victims of price-fixing cartels from foreign businesses and often in conjunction with American businesses.

It is critical to effectively enforce our antitrust laws in this age of global and international business that we have the discovery tools to obtain documents located abroad in order to do the job we have to do. If we cannot get the documents, Mr. Chairman, the fact is because antitrust is so fact intensive and because we have to prove these cases in courts of law, it will very often be the case that in this huge sector of the economy—25 percent virtually of the American economy being now in international trade—if the Antitrust Division is unable to obtain the evidence located abroad to prove our cases in these international antitrust cases, the fact is we will not obtain the convictions, the criminal price-fixing convictions, the Sherman I and Sherman II violations that we need to prove.

And, Mr. Chairman, this is more important today than it has ever been. My predecessor, Jim Rill, who will testify later, made international antitrust enforcement a prime priority of his tenure in this job. He personally went to Japan 12 times in a 3-year term.

He went to Europe numerous times. He had 16 cases at the end of his term in international enforcement. I conferred with Mr. Rill extensively when I was appointed to this job, and I became convinced that his focus on international enforcement was correct, that it was necessary, in fact it was crucial, and with his guidance and that of others, I took the step of appointing the first—Janet Reno did, the Attorney General, with the approval of Congress, but at my recommendation—the first international deputy in the Antitrust Division, and the distinguished holder of that job is Professor Diane Wood, who is perhaps the foremost international antitrust authority in the world today, and she has done a stellar job in this, and she has brought to fruition in many ways the emphasis on international enforcement which begun in the Bush administration and is so important.

We have today 30, 30 major cases with major international aspects. These are section 1 and section 2 cases. They are important cases, and Mr. Chairman and Senator Thurmond, it is a fact that without this legislation we probably will not be able to file cases that we should file and we believe should have the evidence to file, but without the help of this bill, we believe those cases cannot be made because much of the evidence is located abroad, and we need this bill to help us make these and other crucially important cases.

Senator THURMOND. I thought you knew what you were talking about.

Ms. BINGAMAN. I hope I do. We all work hard at it. I will tell you that.

Senator THURMOND. That is the reason I went with you. [Laughter.]

Ms. BINGAMAN. Thank you, Senator.

Senator THURMOND. We got four votes.

Senator METZENBAUM. We got a few minutes.

Ms. BINGAMAN. Do you have to vote?

Senator METZENBAUM. We have a lot of time. I think we can—unless you have a lot of questions. I just had a few. Had you finished, Ms. Bingaman?

Ms. BINGAMAN. Senator, proceed. Certainly, Mr. Chairman.

Senator METZENBAUM. Can you give us some concrete examples of how the bill would help American consumers and American businesses?

Ms. BINGAMAN. I absolutely can. We had a recent experience in the last 8 weeks. We have one extremely effective but very limited treaty which provides for the same types of cooperation that this bill would. This treaty is with Canada, but it only pertains to criminal matters, and it is one country. We exchange documents with Canada cooperatively in building cases cooperatively with them in criminal matters and have since 1991. And Mr. Chairman and Senator Thurmond, just in the last 8 weeks, the Antitrust Division has filed criminal cases in two major price-fixing conspiracies due to the cooperation of the Canadian government in serving our subpoenas in Canada, in giving us that information cooperatively.

The first was in a $100 million price-fixing conspiracy in plastic dinnerware. In 1 year, Americans buy $100 million worth of this. It was price-fixed at a 10 percent overcharge is what the indict-

ment alleges. Criminal fines were paid in excess of $6 million, and the case continues, and Mr. Chairman, as Attorney General Reno said when that case was filed, it would not and could not have been prosecuted without the help of the Canadians.

A second critical case in this regard was filed on July 14, criminal informations. Canada filed parallel criminal informations. This was in thermal fax paper, a price-fixing conspiracy involving both American and Japanese firms. It is the first time in history, to our knowledge, that a Japanese corporation headquartered in Tokyo has filed a criminal information. Over $6 million in fines were paid. That case is ongoing. That is simply in 2 months with one country under only criminal assistance that we have built cases and filed cases involving substantial price-fixing and damage to U.S. consumers and businesses that buy these products that we could not have made without the assistance of the Canadians under this treaty. That is an example of what we believe fervently we can do with other agreements similar to the one we have with Canada.

Senator THURMOND. Mr. Chairman, in order not to hold up Ms. Bingaman because we are going to be tied up for nearly an hour now—we got four votes over there—I am going to let you answer these questions for the record; is that agreeable to you?

Ms. BINGAMAN. That is absolutely fine by me, Senator Thurmond.

[The questions and answers follow:]

QUESTIONS FROM SENATOR THURMOND TO ANNE K. BINGAMAN

Question 1. Could you please explain briefly the current limitations on the ability of the Justice Department to obtain evidence located abroad under treaties or agreements already in place?

Answer 1. The United States has antitrust cooperation agreements with Australia, Canada, Germany, and the European Commission. (The EC agreement was recently declared void as a matter of European law by the European Court of Justice, on the ground that the European Commission had not obtained the necessary approval from the European Council.) All of these agreements are ineffective in meeting today's need for international antitrust enforcement cooperation because they suffer from the limitations this bill is designed to overcome. All of them are subject to limitations in U.S. and foreign domestic law that prevent the U.S. and foreign antitrust agencies from (1) sharing confidential investigative information, and (2) requiring persons or firms in their respective territories to produce evidence needed for a foreign antitrust investigation. The IAEAA would enable the Attorney General and the Federal Trade Commission to obtain this kind of assistance from foreign antitrust agencies by authorizing the provision of reciprocal assistance.

The United States also has mutual legal assistance treaties, providing for assistance in criminal law enforcement generally, in force with nearly 20 foreign countries. However, these treaties have been of limited value for antitrust enforcement, because they are limited to criminal matters and very few foreign countries treat antitrust enforcement as a criminal law matter. Only one of them (the treaty with Canada) expressly covers antitrust offenses. Moreover, we expect antitrust mutual assistance agreements under the Act to become effective in far less time than it commonly takes to bring a treaty into force. In the case of the Canadian MLAT, for example, five years passed between its signing in 1985 and its entry into force in 1990.

Question 2. If this legislation is passed, do you expect that agreements to exchange antitrust evidence would be entered into with very many countries? What countries do you think would be most likely to enter into such agreements with the United States?

Answer 2. We do not know at this stage which foreign jurisdictions will wish to conclude antitrust mutual assistance agreements with the United States, or how many of them. We have not sought or obtained negotiating commitments from other governments in advance of the enactment of this enabling legislation.

However, the informal responses to the proposed legislation among foreign antitrust agencies have been positive. The close cooperation we have had for some years with Canada's antitrust authorities, including two joint investigations that have led to criminal convictions within the past few months, lead us to anticipate that Canada will be among the first countries with which we will discuss the expanded cooperation the Act would make possible.

Question 3. Do you believe that other countries are likely to follow the language of this legislation when they authorize their antitrust agencies to provide information to the United States? That is, is it important for our legislation to contain only those terms that we would like to be applied to us by foreign governments?

Answer 3. We agree that the Act is likely to become the model for antitrust assistance legislation enacted by other countries. That was the SEC's experience, when 1988 and 1990 legislation authorizing mutual assistance in securities law enforcement became the model for comparable laws enacted in many other countries. Thus, we anticipate that any limitations the Act places on the U.S. antitrust agencies' ability to cooperate with foreign antitrust authorities will be mirrored as limitations on the foreign authorities' ability or willingness to provide assistance for U.S. antitrust enforcement. Therefore, we would agree that it is most important that our legislation contain only those items we would be willing to have applied to us by foreign governments (since it is likely that those are the terms which *will* be enacted by foreign governments).

Question 4. In addition to the exchange of information, do you think that this legislation could lead to greater cooperation and better working relationships between U.S. and foreign antitrust authorities?

Answer 4. The inability to share confidential investigative information has been the biggest single impediment to enforcement cooperation with foreign antitrust authorities. We have no doubt that the Act will contribute to closer and more productive working relationships with our foreign antitrust counterparts, with substantial benefits to U.S. antitrust enforcement.

In addition, our experience shows that greater cooperation between antitrust agencies leads to greater convergence of substantive antitrust policies. Because the United States has long been in the forefront among the world's antitrust regimes in the depth of its experience and its contribution to the development of antitrust theory, our interaction with foreign antitrust authorities should have substantial influence on foreign antitrust enforcement.

Senator METZENBAUM. Let me just take one more question. Thanks to your efforts, there is a good deal of support among the business community for the bill. One of the few concerns that has been raised is whether the safeguards in the bill are sufficient to prevent foreign competitors from getting their hands on exchanged documents. How do you intend to protect U.S. documents once you turn them over to a foreign authority?

Ms. BINGAMAN. We have considered this extensively because it is obviously of crucial and critical and legitimate interest to U.S. business, and we are as concerned about it as they are. And I would say the following. Number one, we have experience with the government of Canada in this regard and have had no problems whatsoever. Number two, the U.S. government has criminal mutual legal assistance treaties with a number of countries, over 20 in other areas other than antitrust, which work extremely effectively. Number three, the SEC on which this legislation is modeled has worked extremely effectively and with no breach of confidentiality with 15 countries.

So the first point I would make is that there is a tremendous record of the ability of foreign governments to work together and safeguard highly sensitive, confidential information, similar if not identical in type and scope to what would be covered here. Number two, specifically this bill has addressed substantial and has included substantial procedural safeguards to protect and ensure that confidential treatment would be accorded. And let me run briefly through those.

Number one, there has been added in the last few weeks from the consultation with the business community a provision for a notice and comment period which allows interested persons to comment and notify us if they know of problems with confidentiality and with any prospective foreign enforcement agency with which we have stated an intention to enter an MOU, and the draft of the MOU is published in the Federal Register. So it is spread upon the record for the world to know and for people to come to us, and, Mr. Chairman, I pledge to you, I and any holder of this job, would take with the utmost seriousness a record of problems in any kind of confidentiality before entering into the MOU.

Second, each case in which we determined, even if an MOU is entered into, each case, there is a case by case determination made as to whether the documents are legitimately needed, what safeguards will be put in place in that particular case, whether they will be accorded confidential treatment, and so forth.

Third, there is a requirement that we make a public interest determination before turning over documents. Mr. Chairman, that specifically requires that we consider whether a particular company or government owns a company, a private company, a proprietary interest in a competitor, and that is a significant factor that would weigh heavily in our determination. Fourth——

Senator METZENBAUM. Can you summarize so we do not miss the vote?

Ms. BINGAMAN. Yes; I am sorry. I will do this quickly. But this is a major concern in the bill. Fourth, there is a requirement that the foreign authority comply with all confidentiality. That it be used only for antitrust enforcement. If after all of those conditions are found and met in each particular case, there is, happens to be a breach of confidentiality, we are to be notified immediately and we are to terminate the agreement, period, with that country, very serious consequences unless we can be assured it will never happen again.

So Mr. Chairman, I think we have given great care to this. It has worked in many other contexts with many other exchanges of confidential documents. In the international world we are living in today, it is crucial to our interests, our interests as law enforcement agencies, that we be able to obtain the documents located abroad. The only way we can do it is to have something to give back, but we will be very careful.

Senator METZENBAUM. Thank you very much, Ms. Bingaman. We will have some questions. We appreciate the opportunity to work with you, and I think we will pass this legislation this session.

Ms. BINGAMAN. Thank you, Mr. Chairman.

[The prepared statement of Anne K. Bingaman follows:]

PREPARED STATEMENT OF ANNE K. BINGAMAN

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: I am pleased to be here today to testify on behalf of the Administration in support of S. 2297, the International Antitrust Enforcement Assistance Act of 1994. Enactment of this legislation is vitally needed if we are to bring our antitrust enforcement tools into line with the realities of the global economy of today and tomorrow.

I want to express the Administration's appreciation, and my personal appreciation, for the bipartisan effort that has led to the introduction of this bill. I want particularly to thank Senators Metzenbaum and Thurmond for their commitment to de-

veloping an effective and balanced bill, and Senators Kennedy, Biden, Leahy, Simon, Simpson, Grassley and Specter for their cosponsorship.

This bill is the product of an extensive and constructive dialogue in which I have met with many members of the Committee and Committee staff, as well as counterparts on the House side, with representatives of the business community and of the bar. A special task force of the American Bar Association's Antitrust Section, formed to study the bill and led by former Assistant Attorney General Jim Rill, has made a tremendous contribution.

A broad consensus has come out of this dialogue. First, there is agreement that more effective enforcement tools are needed to protect American businesses and consumers from anticompetitive conduct in the international arena. Second, there is agreement that these tools must and can be developed in a way that safeguards confidential business information obtained from American firms from misuse or improper disclosure abroad. S. 2297 has been carefully crafted to achieve these objectives.

We live in a global economy, in which the subject matter of antitrust enforcement can be as geographically widespread as the firms and the business activity that affect our nation's markets. Nearly a quarter of the United States' GDP is accounted for by export and import trade, roughly double the figure after World War II.

Today, international considerations in antitrust enforcement are in the mainstream of our enforcement activity. The Antitrust Division currently has some thirty active Sherman Act matters with major international aspects—nearly *double* the number that were ongoing just one year ago. And the number that were ongoing a year ago was itself high by historical standards, reflecting the renewed emphasis on international enforcement that Jim Pill, my predecessor under President Bush, had already begun.

Continuing this strengthening of the Division's international enforcement program has been a priority of mine since the day I came into office. One of the first steps I took was the creation, with the approval of Congress, of the position of international deputy assistant attorney general for antitrust, and the appointment of Professor Diane Wood to that position.

But the more active we are, the more apparent it is that the tools we have to deal with this international playing field are out of date. Enforcing the antitrust laws is a fact-intensive job. We need evidence to determine whether the law has been violated. If we conclude that there has been a violation, we need evidence to make a case that will stand up in court.

More and more often, the evidence we need is located abroad. Unfortunately, evidence that is located abroad is far too often evidence that is beyond our reach—whether it is in the hands of private firms or individuals, or in the possession of a foreign antitrust enforcement agency. And when we cannot enforce our antitrust laws against foreign anticompetitive conduct because we cannot get the evidence, it is American consumers and American businesses that bear the cost.

The International Antitrust Enforcement Assistance Act would give us the tools we need to get foreign-located antitrust evidence that is beyond our reach today. The bill would enable the Justice Department and the Federal Trade Commission to enlist the help of foreign antitrust enforcers to get crucial antitrust evidence already in the foreign agencies' files, or in the possession of persons in their territory, by allowing us to offer reciprocal assistance in their antitrust investigations.

THE NEED FOR FOREIGN-LOCATED EVIDENCE

I noted a moment ago that the Antitrust Division currently has some thirty active Sherman Act investigations and cases with substantial international aspects. The most difficult challenge in these matters—and too often the biggest frustration—is getting information and documents from outside the United States. Many of these investigations involve straight-out cartel conduct aimed at American businesses and consumers. In several of these investigations, there is a serious possibility we will be unable to get the evidence to prosecute because crucial witnesses or documents are abroad and beyond our reach.

In some of these cases, only the U.S. is targeted and only U.S. antitrust laws are involved. Others of these cartels are aimed at both U.S. and foreign markets, and could be far more effectively investigated and prosecuted by joint action between U.S. and foreign antitrust authorities. In one such investigation recently, we seriously considered launching a coordinated investigation with a foreign antitrust authority; but we recognized that provisions in both our laws would have prevented our sharing the evidence we obtained in our respective territories. We have good reason to believe the foreign antitrust authority involved could have obtained valuable evidence that was beyond our reach.

But let me give you a different example, in this case an example of what can be done with the kind of cooperation S. 2297 would make possible. Just three weeks ago, as a result of a joint investigation between the Antitrust Division and our counterparts in Canada's Bureau of Competition Policy, we broke up a $120 million a year international cartel in the fax paper market. Criminal charges were filed in both the United States and Canada as a result of that successful cooperation. In the U.S., those charges were against a Japanese corporation, two American subsidiaries of Japanese companies, and the former president of one of the U.S. subsidiaries, for their involvement in a price fixing conspiracy that raised thermal fax paper prices by approximately ten percent. The defendants pled guilty, and agreed to pay U.S. criminal fines of more than $6 million, and Canadian criminal fines of nearly 1 million Canadian dollars.

And just a few weeks earlier, in another investigation with critical Canadian assistance, including simultaneous raids for documents in the United States by the FBI and in Canada by the Royal Canadian Mounted Police, we successfully completed a major price fixing investigation in the $100 million a year plastic dinnerware industry. Criminal fines in the case so far have exceeded $8 million, and more are expected.

These joint U.S.-Canadian investigations were possible only because we and the Canadians have a mutual legal assistance treaty for cooperation in criminal law enforcement that covers antitrust cases. Unlike Canada, however, most countries with which the United States has agreements of this kind do not treat antitrust matters as part of their criminal law, and thus it is far more difficult, and in some cases impossible, to use these agreements as a vehicle for cooperative efforts.

Let me give you another example. I know you are familiar with the parallel settlements last month of the U.S. and European Commission antitrust cases against Microsoft. It is absolutely clear that our cooperation with the European Commission in that case led to faster, more effective and consistent relief than would have been possible for either us or the European Commission working alone. As *Business Week* put it in an editorial last week, "In an era of global competition, the Justice Dept. used sound judgment by working closely with European governments. This also frees companies from having to defend the same case twice." The FINANCIAL TIMES called the joint settlements a "milestone in antitrust law" that resulted from "unprecedented cooperation between authorities in Washington and Brussels."

But cooperation in the Microsoft case was possible only because Microsoft agreed that the Justice Department and the European Commission could share information Microsoft had provided to the two agencies. Cooperation with Canada in the plastic dinnerware and fax paper cartel cases was possible only because the U.S.-Canada MLAT came into play. With S. 2297 we will be able to expand this kind of cooperation, to come closer to the day when cartels can no longer prey on the American market from safe havens abroad.

All of the antitrust agreements we have entered into in the past with some of our foreign counterparts fall short, because they are limited by existing law. None of these agreements allows the enforcement agencies to share investigative information whose confidentiality is protected under national law. And none of them allow an antitrust agency to obtain information from private parties on a compulsory basis to assist an antitrust investigation in the other country. Even our 1991 agreement with the European Commission—the most recent of our existing antitrust agreements—would not have allowed us to discuss the evidence in our respective cases if Microsoft had not waived its objection to our doing so.

The vital importance of cooperation and access to foreign-located evidence has been recognized in other areas of economic law, where there are cooperative arrangements for access to foreign evidence that far surpass what can be done under present law in antitrust enforcement. Notably, in the securities area—where the internationalization of the securities marketplace beginning in the 1980's highlighted the need for international cooperation in policing securities markets—the SEC has fifteen memoranda of understanding with its foreign counterparts under which it can obtain confidential investigative information and seek assistance in obtaining overseas evidence, in exchange for the SEC's agreement to reciprocate. Similar arrangements exist for tax law enforcement.

This is the kind of authority we need for antitrust—authority that will expand our ability to protect businesses and consumers from anticompetitive conduct, wherever it takes place, that violates our antitrust laws. We need to be able to ask our foreign counterparts for information in their investigative files. We need to be able to ask our foreign counterparts to obtain information for us from companies and individuals in their territory. And in order to get that kind of cooperation, we need legislation that will allow us to reciprocate.

S. 2297 WILL PROVIDE THE NEEDED TOOLS

First, S. 2297 would help us get evidence that foreign antitrust authorities have gathered in their own antitrust investigations that is relevant to a violation of our antitrust laws. The bill would allow the Justice Department and Federal Trade Commission to reciprocate by responding to requests from foreign antitrust authorities for investigative information that cannot be disclosed to them today because of confidentiality provisions in the Antitrust Civil Process Act, grand jury secrecy rules, and comparable provisions in the Federal Trade Commission Act.

Second, the bill would enable us to get assistance from foreign antitrust authorities in gathering evidence from private firms or individuals that are beyond the reach of U.S. process, by giving us the ability to reciprocate. It would allow the Justice Department to use antitrust civil investigative demands to obtain information on behalf of foreign antitrust authorities, or to seek a court order to compel the production of documents or testimony in the United States in aid of a foreign antitrust investigation.

All of these provisions are accompanied by extensive safeguards to make sure that confidential business information obtained from American firms will not be misused or improperly disclosed by foreign antitrust authorities. These safeguards are a crucial part of the bill. They are there to give confidence that these vital tools designed to protect our businesses and consumers from illegal anticompetitive conduct will not themselves open the door to unfair competition from abroad. Let me summarize these safeguards.

(1) First, *antitrust evidence could be provided to a foreign antitrust authority under the bill only pursuant to a publicly disclosed antitrust mutual assistance agreement.*

(2) *Before entering into any agreement, and before providing assistance under any agreement, the U.S. antitrust agencies would have to be satisfied that the foreign antitrust authority can and will meet stringent confidentiality requirements for the information that we provided.*

- The foreign antitrust authority must have laws in place that give protection to any information it receives from the U.S. authorities that is no less than the protection the information would have in the hands of the U.S. agencies.
- The Attorney General or Federal Trade Commission, as the case may be, must be satisfied that the foreign authority can and will comply with all applicable confidentiality requirements.
- The information must be used only for antitrust enforcement.
- The information must be returned to the Attorney General or Federal Trade Commission at the end of the foreign investigation or proceeding.
- If there is ever a breach of confidentiality, the person that provided the information would have to be notified, and the mutual assistance agreement would be terminated unless adequate steps were taken to minimize the harm from the breach and to make sure the breach does not recur.

(3) *The bill does not authorize the disclosure of premerger information that was received by the Attorney General or the Federal Trade Commission under* §7A of the Clayton Act (Title II of tile Hart-Scott-Rodino Antitrust Improvements Act of 1976).

(4) In addition, *the bill does not authorize the disclosure of information submitted to the U.S. Government in connection with title III of the Export Trading Company Act of 1982 or any other statute that is not a federal antitrust law within the meaning of the bill.*

(5) *The bill makes it clear that national security information cannot be passed along to a foreign agency.*

(6) *The bill includes provisions to assure that assistance under these agreements will be a two-way street, and that the foreign antitrust agency will provide us with assistance that is comparable in scope to what we agree to provide in return. We have no intention to enter into one of these agreements—and the bill would not allow us to—unless we are satisfied that we are getting value in return. The whole point of this bill is to allow us to obtain the evidence we need to prosecute anticompetitive conduct that violates our laws, and we will not enter into agreements that do not further that objective.*

(7) *Before providing assistance under the Act in response to any foreign request for assistance, the Attorney General or the Federal Trade Commission must conclude that doing so is consistent with the public interest of the United States.* This important safeguard gives further assurance that the

Act will be implemented in a way that advances, and that it does not put at risk, important U.S. interests. The bill specifically directs the Attorney General and the Federal Trade Commission to include in their consideration any proprietary interest the foreign government involved may have that could benefit from or be affected by the assistance the U.S. agencies have been asked to provide.

CONCLUSION

Mr. Chairman, S. 2297 represents a carefully prepared mechanism that will allow us to get the evidence we need to enforce our antitrust laws in today's global economy, while safeguarding sensitive business information against misuse and improper disclosure. With this legislation, I believe that I and my successors, and our colleagues at the Federal Trade Commission, will have the tools we need to extend the level playing field for the benefit of American consumers and American businesses through expanded international antitrust cooperation.

I will be pleased to answer any questions that members of the Committee may have.

Senator METZENBAUM. This committee stands in recess until I can get back, which I would guess would be about 45 minutes.

[Recess.]

Senator THURMOND. Senator Metzenbaum's staff suggested we go ahead. So Mr. Mann, if you want to proceed.

STATEMENT OF MICHAEL MANN, DIRECTOR, OFFICE OF INTERNATIONAL AFFAIRS, SECURITIES AND EXCHANGE COMMISSION

Mr. MANN. Thank you, Mr. Chairman. I am pleased to testify today on behalf of the Securities and Exchange Commission regarding the SEC's experience with and statutory authority for international enforcement cooperation. The SEC is a domestic regulator with long-standing ability to gather information in the U.S. for use in investigations. Such domestic powers, however, needed to be supplemented as the United States' markets developed into the largest and most international securities markets in the world. Today over 600 foreign companies have securities listed on U.S. markets.

In the last 10 years, the dollar volume of U.S. stocks purchased and sold from abroad increased five-fold from approximately 124 billion in 1984 to 617 billion in 1993. Now it is no more difficult to initiate a U.S. securities transaction from abroad than it is from within the United States. In addition, those who trade through offshore accounts frequently enjoy the protections of a foreign country's banking or blocking laws, often to the detriment of U.S. investigative agencies like the SEC and the investors we seek to protect.

The problem is straightforward. Where violators of the U.S. securities laws conduct aspects of their schemes from beyond U.S. borders, the SEC must be able to obtain evidence located in those countries. But though the SEC has broad powers to subpoena witnesses and evidence, it cannot serve or enforce its subpoenas abroad. Until fairly recently most of our foreign counterparts lacked the authority to use their compulsory investigative powers to assist our investigations unless they suspected an independent violation of their domestic securities laws.

As a result, the SEC was not able to readily gain access to foreign-based information that it needed for investigative purposes. The only practical solution was to create a regime where we could work directly with our foreign counterparts, having them be in a

position to assist us when our investigations led to their national borders and vice versa. The first step in this effort was for the SEC to obtain the authority which Congress granted in 1988 to exercise its subpoena power on behalf of foreign authorities in order to investigate possible violations of foreign securities laws.

That legislation contained in section 21(a)(2) of the Securities Exchange act gives the SEC the discretion to issue a subpoena regarding alleged violations of foreign securities law. Because the statute directs the SEC to consider whether the foreign requesting authority has agreed to provide reciprocal assistance to the commission, the statute has created a powerful incentive for foreign countries to grant similar authority to their own securities regulators.

Section 21(a)(2) has become a model for securities enforcement legislation in the rest of the world. To date, no fewer than 11 foreign countries have adopted similar legislation. And the approach of section 21(a)(2) has been endorsed by two international organizations of securities regulators. With the United States at the forefront, an environment of cooperation has been created in the area of securities regulation.

Section 21(a)(2) and related legislation enacted in 1990 have provided the SEC with the flexibility to develop strong, cooperative, reciprocal arrangements with foreign counterparts frequently in the form of bilateral understandings known as memoranda of understandings or MOU's. An MOU sets out the procedures and understandings including specific safeguards regarding confidentiality and the manner in which information can be used by which the SEC and its foreign counterparts may cooperate. To date, the SEC has entered into 15 such MOU's with foreign authorities. The SEC now provides assistance and receives assistance from foreign regulators on almost a daily basis.

Last year alone, the commission made over 200 requests for assistance from our counterparts abroad. The trend is clear. As our markets have become increasingly international, we have seen securities law violators attempt to use every device, border, and international legal impediment to slow the efforts of the SEC to investigate and prosecute them. Accordingly, our cases have grown increasingly complex. Often, we must follow leads all over the world seeking new clues, new documents, and new facts on which to pursue the wrongdoers.

Armed with its international investigative authority, its MOU's and its other cooperative arrangements, the SEC with the support of Congress is now well positioned to police the internationalized market of the United States. I would be pleased to answer any questions.

Senator METZENBAUM. Thank you very much, Mr. Mann. I am sorry I did not get here for your opening, but I glanced through what you were saying, and I think I am up to speed. As you know, our bill is modeled on SEC law which allows the agency to share confidential information with its foreign counterparts. However, the SEC law does not contain the same safeguards against the disclosure of confidential business information that we have included in our bill.

I am told that SEC investigations gather sensitive business documents that U.S. companies would not want to fall into the hands of their foreign competitors. Under your exchange authority, those same documents can be shared with foreign authorities. Has the SEC ever had a foreign securities authority leak confidential business information that it received from your agency?

Mr. MANN. No, we have not, Senator.

Senator METZENBAUM. Are there cases that the SEC would have lost in court without the evidence that it got from abroad?

Mr. MANN. Well, I think the question is not are there cases—from our perspective, we would pursue all of the cases that come before us with as much vigor as necessary to try to prevail. What the legislation has changed for us is it has given us a tool that makes it much more efficient to go forward and investigate securities fraud. Today because we can ask our foreign counterparts for assistance, we do not have to end up in complex litigation in the United States in foreign courts where we would have to put 5 or 10 staff people working for a matter of weeks or months to be able to compel the production of evidence.

In the 1980's when we were confronted with these cases, the only way we got information was by appealing to U.S. and foreign courts. That was expensive. It was time consuming, and often the evidence was stale by the time we got it. I would not say that the SEC would ever back away from a case if we believed there was wrongdoing. What we would end up doing, however, is using our resources in a way that would be much more costly to the agency, and as a result, our ability to bring the 400 cases we bring a year would be drastically reduced.

Senator METZENBAUM. Thank you very much, and I want to say just before I turn the floor over to my colleague that I think the SEC in the last 1½ years has been so much more aggressive an agency and is doing such a superb job that you should have a right to be proud of the fact that you are part of the team. I think it has been an activist SEC and it is in contradistinction to that which we experienced for the 12 years previous.

Mr. MANN. Thank you, Senator.

Senator METZENBAUM. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman. Mr. Mann, based on your experience at the SEC, do you believe that other countries are likely to follow the language of this legislation when they authorize their antitrust agencies to provide information to the United States?

Mr. MANN. Yes, I do, Senator. In fact, our experience was when we were drafting our own legislation that countries made clear that they would give us no more than we were willing to obtain ourselves. And as a result, when we drafted the legislation, there is a specific statement that there not be a requirement of dual criminality. The reason for that is that if we put in a requirement of dual criminality, so would they. Their laws are narrower and often quite different than ours. We would get less assistance and while it would not hamper their investigations because of the breadth of our law, it would hamper our own. And since the purpose of this legislation is to provide a carrot so that our investigations can be

more complete, we felt that the best way was to set a model in the legislation that could be followed, and it has been.

Senator THURMOND. Is it important for our legislation to contain only those terms that we would like to be applied to us by foreign governments?

Mr. MANN. I believe so. I think that the terms when you are speaking of cooperation, the more open-ended the possibilities are in terms of what kind of assistance can be brought, the better the legislation, the better the foundation the legislation will leave for the negotiators of the understandings that will be put in place as a result of the legislation.

One of the things that we have found in negotiating our understandings and in implementing them is that we work closely with our counterparts and the Justice Department and the State Department to evaluate requests that we receive. We receive enormous amount of information about the basis for the request under the MOU's. And so it is critical that the legislation lay a foundation that will make it easier to negotiate these understandings.

Senator METZENBAUM. Mr. Mann, what is your perspective on the view of some businesses that materials in the possession of the antitrust agencies may have greater commercial sensitivity than the information in the possession of the SEC?

Mr. MANN. Well, I am not an expert in the antitrust laws. I know that we receive an enormous amount of information about financings, about bank accounts, about transactions and trading strategies as a routine matter which we share with our foreign counterparts. That information is considered to be highly sensitive by the firms that give it to us and the people that give it to us, and, in fact, there is almost no request that we would make or demand that we would make for information where we would not contemporaneously with the information being received also receive a request for confidential treatment under the Freedom of Information act. So obviously they feel that it is highly sensitive, and as a result, I would say that the information that we share is very sensitive.

Senator THURMOND. Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you very much, Senator Thurmond. Thank you very much, Mr. Mann, and we look forward to working with you.

Mr. MANN. Thank you, Senator.

[The prepared statement of Michael D. Mann follows:]

PREPARED STATEMENT OF MICHAEL D. MANN

CHAIRMAN METZENBAUM AND MEMBERS OF THE SUBCOMMITTEE: I am pleased to testify today, on behalf of the Securities and Exchange Commission ("the SEC" or "the Commission "), regarding the SEC's experience with and statutory authority for international enforcement cooperation.

With the increase in international securities trading, the information the SEC needs to enforce the U.S. securities laws is often outside the United States. The SEC has found that cooperation with foreign securities authorities, rather than unilateral action, is generally the best way to obtain information abroad. The SEC has also found that it is useful to formalize its relationships with foreign securities authorities in memoranda of understanding ("MOUs "). The SEC now has MOUs with many of its major foreign counterparts, including those in Canada, France, Italy, Japan, Mexico and the United Kingdom. The SEC continues to negotiate and enter into new MOUs, including a recent understanding with the securities regulator in

China. Several provisions in the federal securities laws have assisted the SEC in negotiating strong MOUs with foreign regulators and obtaining useful assistance from them in particular cases. These statutory provisions include:

Section 21(a)(2) of the Securities Exchange Act of 1934 ("the Exchange Act "), added in 1988, which authorizes the SEC, at the request of a foreign securities authority, to gather information in the United States about potential violations of foreign securities laws;

Section 24(c), added in 1990, which confirms the SEC's authority to provide access to its existing nonpublic files to foreign securities authorities; and

Section 24(d), also added in 1990, which, under certain circumstances, provides an exemption from disclosure under the Freedom of Information Act for information obtained by the SEC from a foreign securities authority.

Section 21(a)(2) has become a model throughout the world for developing legislation to authorize securities regulators to assist their counterparts in investigating cross-border violations of law. These provisions in the relevant foreign laws have already proven useful to the SEC in many investigations.

I. THE SEC'S INTERNATIONAL ENFORCEMENT PROGRAM

A. The challenge of international markets

The SEC is a domestic regulator. The markets it regulates, however, are the largest, most international securities markets in the world. Over six hundred foreign companies have securities listed or traded on U.S. markets. The dollar volume of U.S.stocks purchased and sold from abroad increased from $124.3 billion in 1984 to $617.3 billion in 1993.[1]

Today it is no more difficult to conduct a U.S. securities transaction from abroad than it is from within the United States. The point of origin of the trade, however, has potentially important implications for the SEC's enforcement program. The classic example of the use of international borders to attempt to evade detection occurred in the *Santa Fe* case.[2] In *Santa Fe,* several of the largest Swiss banks purchased for their clients substantial amounts of stock options in the United States just before the announcement of a tender offer for Santa Fe International. The timing of the transactions, combined with the overnight profits of millions of dollars, immediately raised the SEC's suspicions. However, it took almost three years of intergovernmental exchanges before the traders, all of whom were foreign friends of one of the company's directors, were identified to the SEC by the Swiss authorities.

Americans, as well as foreigners, have used foreign accounts in an attempt to evade the U.S. securities laws. Indeed, Dennis Levine, an American investment banker based in New York City, became a prominent "foreign" insider trader by trading through a branch of a Swiss bank located in the Bahamas. His transactions often started with phone calls from various pay phones in Manhattan. His attempts to evade the law ultimately failed because the SEC was able to convince the Attorney General of the Bahamas that, under the particular facts of that case, banking secrecy should not be applied to Levine's securities transactions. In *Levine,*[3] as in *Santa Fe,* however, the intergovernmental discussions were time-consuming and the results unpredictable.

The problem is relatively straightforward: where violators of the U.S. securities laws conduct aspects of their schemes from beyond U.S. borders, the SEC must be able to obtain evidence located in other countries. The SEC has broad powers to subpoena witnesses and evidence, but it cannot serve or enforce its subpoenas abroad.[4] Moreover, institutions whose records are often critical to SEC investigations, such as foreign banks, frequently are prohibited by their own countries' secrecy laws from assisting the Commission.

B. The SEC's response to internationalization

The SEC's first efforts to pierce foreign jurisdictional barriers were made in the U.S. courts. In such cases, the SEC would serve a subpoena on a U.S. branch of a foreign bank and seek a court order compelling the bank to provide documents

---

[1] Securities Industry Association, *1994 Securities Industry Fact Book* at 42.

[2] *See SEC* v. *Certain Unknown Purchasers of the Common Stock of, and Call Options for the Common Stock of, Santa Fe Int'l Corp.,* [1984–85] Fed. Sec. L. Rep. (CCH) para. 91,951 (S.D.N.Y. Feb. 20, 1985).

[3] *SEC* v. *Levine,* SEC Lit. Rel. No. 11,095, 35 SEC Dkt. 898 (May 12, 1986).

[4] *See* Exchange Act Section 21(b), 15 U.S.C. §78u(b); *CFTC* v. *Nahas,* 738 F.2d 487 (D.C. Cir. 1984); *SEC* v. *Zanganeh,* 470 F. Supp. 1307 (D.D.C. 1978).

located abroad.[5] These SEC efforts, while successful, were hotly contested. Moreover, they were expensive, protracted, and drew enormous criticism from the other nations as unjustified extraterritorial assertions of jurisdiction. Under the circumstances, and given the expanding number of cases the SEC had to address, it was clear that a new approach was needed.

In response, the SEC has developed a program of international information gathering that is premised on cooperation rather than confrontation. The SEC has entered into direct, bilateral arrangements known as memoranda of understanding with its foreign counterparts. MOUs define and formalize procedures to request and provide information in connection with the efforts of the Commission and its foreign counterparts to administer and enforce their respective securities laws. In addition, as situations arise where information is located in countries with which the SEC does not have an MOU, the SEC also establishes case-specific arrangements with foreign authorities that are premised on the same underlying principles as MOUs.

When the SEC began to explore cooperation as the medium for gaining access to foreign-based information, and the use of MOUs as formal vehicles for cooperation, it became clear that the success of such an approach would depend on legislative changes. The SEC and most of its foreign counterparts lacked the authority to use their compulsory investigative powers unless there was an independent basis for suspecting a violation of domestic securities law. Therefore, the most to which any authority would agree was to provide information that it had "in its hands" or that it could obtain through its "best efforts." As a result, despite the best intentions of the SEC and its counterparts, it was impossible to have effective cooperation, particularly when the production of bank records was at issue.[6]

I. THE INTERNATIONAL ENFORCEMENT AMENDMENTS TO THE EXCHANGE ACT

The only practical solution to the SEC's information gathering problem was to obtain legislative authority to assist its counterparts and conversely for its counterparts to obtain similar authority. The first step in this process came with the addition of Section 21(a)(2) of the Exchange Act in 1988. In drafting that legislation, Congress built upon the SEC's broad domestic investigative powers under the Exchange Act and thereby incorporated the body of law and practice that had developed over the course of the last 55 years.

Section 21(a)(2) now permits the SEC, "in its discretion," to conduct an investigation, including the use of its compulsory powers, on behalf of a foreign securities authority. In deciding how to exercise its discretion, the Commission is directed to consider "whether (A) the requesting authority has agreed to provide reciprocal assistance in securities matters to the Commission; and (B) compliance with the request would prejudice the public interest of the United States." Such assistance may be provided "without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States."[7] This approach was taken because the securities laws of the United States are broader than those of most other countries, and the alternative "dual criminality" approach, if adopted in foreign legislation, would have greatly restricted the reciprocal assistance available to the SEC.[8]

Section 21(a)(2) gives the Commission the discretion to issue a subpoena regarding alleged violations of foreign laws relating to securities matters. This section works in the following manner: A foreign authority seeking the SEC's assistance submits a request detailing the facts which constitute potential violations of its laws. The Commission then reviews the request and makes a determination whether to authorize the issuance of a subpoena. If the Commission authorizes the use of compulsory powers, the staff conducts an investigation in the United States, gath-

---

[5] *See, e.g., SEC* v. *Banca Della Svizzera Italiana,* 92 F.R.D. 111 (S.D.N.Y. 1981).

[6] IAs an alternative means of obtaining evidence located outside of the United States, the SEC is sometimes able to use certain mutual legal assistance treaties to which the United States is a party. These treaties provide for the exchange of information in criminal matters only, and generally require that the violation under investigation constitute an offense under the laws of both the requesting and the requested country. Because the U.S. securities laws are often broader than those of other countries, many requests for information under mutual assistance treaties can be denied by foreign governments for lack of "dual criminality." In addition, these treaties, which were not designed specifically for securities enforcement matters, require the involvement of domestic and foreign criminal authorities.

[7] 15 U.S.C. §78u(a)(2).

[8] Assistance by a federal agency in civil law enforcement is similar to the assistance that has, since 1855, been provided by U.S. courts to foreign courts under 28 U.S.C. §1782 and its predecessors. *See* Stahr, *Discovery Under 28 U.S.C.* §1782 for Foreign and International Proceedings, 20 Va. J. Int'l L. 597 (1990). International assistance in civil cases is also akin to the assistance routinely provided in criminal cases.

ering the requested information as it would in a domestic case. In this way, the Commission retains control of the investigation in the United States. Because the legislation relies upon the Commission's established procedures for conducting investigations, witnesses have all of the rights and privileges accorded witnesses in SEC proceedings, thus avoiding constitutional questions.

Moreover, the legislation provides the SEC with flexibility, as the Commission is not required to enter into an M0U before granting assistance to a foreign securities authority. In the absence of an MOU, the SEC may, if it receives all necessary confidentiality and use assurances, assist a foreign regulator in investigating a fraud, and thereby demonstrate the value of international cooperation. This allows the SEC to use its powers to encourage the development of reciprocal assistance powers in countries that may not yet be in a position to enter into broad MOUs.

The SEC will not, however, provide investigative assistance to a foreign regulator unless it receives assurances concerning the use of the information to be provided similar to those memorialized in an MOU. Generally, a request must provide a description of the information sought and an explanation therefor. The request must also make clear how any information provided by the SEC may be used, as well as contain confidentiality provisions detailing to whom the foreign authority may disclose the information.

At the same time that the SEC sought the authority provided in Section 21(a)(2), the SEC sought another statutory amendment, adopted in 1990 as Section 24(c) of the Exchange Act. This confirms the Commission's authority, upon a showing that such access is needed, to exercise its discretion to provide foreign securities authorities with access to records in its possession or that it may have gathered on behalf of that authority.[9] This provision permits the sharing of information already held in the SEC's nonpublic files in cases where the persons being investigated by the SEC also may have violated the laws of other countries.

In 1990, Congress added Section 24(d) to the Exchange Act to offer predictability regarding how information that is considered confidential under the laws applicable to the foreign authority would be treated under the U.S. Freedom of Information Act ("FOIA "). Prior to the amendment of Section 24, some foreign securities regulators declined to enter into information-sharing arrangements with the SEC because they had concerns regarding the SEC's ability to maintain the confidentiality of the information.Under Section 24(d), the SEC cannot be compelled under FOIA to disclose records obtained from a foreign securities regulator pursuant to an MOU if the foreign regulator has "in good faith determined and represented to the Commission that public disclosure of such records would violate the laws applicable to that foreign securities authority." [10]

III. THE SIGNIFICANCE OF SECTION 21(A)(2)

Section 21(a)(2) has provided a model for the rest of the world to follow. Since its adoption, Argentina, Australia, Canada, Chile, France, Italy, Japan, Mexico, the Netherlands, Spain, and the United Kingdom have all adapted legislation authorizing the use of compulsory powers at the request of foreign securities authorities.

Recently, at the SEC's initiative, the substance of Section 21(a)(2) was endorsed on a multilateral basis. This June, fourteen members of the multinational Council of Securities Regulators of the Americas ("COSRA ") approved an enforcement cooperation resolution tracking the language of Section 21(a)(2). The COSRA members agreed "to assist to, the fullest extent possible and according to their respective laws, other [COSRA] Members in their efforts to obtain from persons in their jurisdictions information, documents, and statements relevant to any enforcement or regulatory inquiries being conducted by another COSRA Member to ensure compliance with that Member's securities laws." They also agreed to "[u]se all reasonable efforts to obtain legal authority * * * where a COSRA Member lacks the legal authority to provide the assistance contemplated by this framework." The even broader membership of the International Organization of Securities Commissions ("IOSCO"), a worldwide organization of securities regulators in which the SEC plays an active role, adopted a similar resolution in 1989.

With the United States at the forefront, an environment of international cooperation has been created in the securities area. To date, in addition to communiques and technical assistance memoranda, the SEC has entered into fifteen MOUs with

---

[9] 15 U.S.C. § 78x(c).

[10] Section 24(e)(2) provides that the SEC may not withhold information from Congress and that the SEC can comply with a court order for disclosure to a defendant where the Commission or the United States is the plaintiff in a lawsuit.

foreign authorities, including the recently completed historic understanding with the China Securities Regulatory Commission.

The SEC's MOUs are generally non-binding understandings with fellow securities regulators that are intended to facilitate mutual assistance in a wide variety of matters. Before entering into an MOU, the SEC and the foreign securities authority exchange information about their regulatory systems and thereby learn about the specific interests, needs and capabilities of the other. The SEC strives to make its MOUs fit the circumstances of the foreign market, whether it is developed (*e.g.*, France, the U.K.) or just developing (*e.g.*, China).

The SEC's MOUs are dynamic understandings designed to evolve with the applicable legal, regulatory and market environments. As with the China MOU, most of the recent MOUs provide for consultation on all matters regarding the protection of investors and the operation of the securities markets in the two countries. The development of cooperative relationships through the MOU process has led to an atmosphere where requests for enforcement assistance from the SEC are more likely to be met with a "can do" cooperative response. The Commission's cooperative relationships with its counterpart agencies abroad have also strengthened the Commission's regulatory program. They have, for example, allowed the SEC to verify information about cross-border offers and to get information about important market developments outside of the United States.[11]

The SEC now provides assistance to, and receives assistance from, foreign regulators on an almost daily basis. In Fiscal Year 1993, the SEC made 213 formal enforcement requests to foreign authorities, and the SEC received some 232 requests for enforcement assistance. In Fiscal Year 1993, the Commission also referred one enforcement matter to a foreign government and received 16 enforcement referrals from other countries.[12]

As a general matter, the Commission's investigations involve extensive document review and are often predicated on circumstantial evidence gleaned from the documents and from testimony. Through MOUs and other cooperative means, the SEC is able to gain access to foreign-based documents, including bank and brokerage account statements, and thereby see the full picture of the relevant transactions, rather than just the limited parts conducted in the United States. Having been assisted in obtaining pieces of investigative puzzles through its cooperation with foreign counterparts, the SEC has been better able to carry out its statutory function of enforcing the federal securities laws.

IV. CONCLUSION

In sum, the international securities enforcement legislation passed in 1988 and 1990 has fostered a spirit of cooperation among international securities authorities. The SEC has used the legislation to strengthen relationships with its foreign MOU partners and is continuing to develop cooperative arrangements with other foreign counterparts. In today's international securities markets, this cooperation among regulators is crucial to the protection of the American investor.

Senator METZENBAUM. Our next panel consists of James Rill, Collier, Shannon, Rill & Scott, who is the former Assistant Attorney General for Antitrust, the position that Anne Bingaman now holds; Alan Silberman, chairman of the Antitrust Section of the American Bar Association; Mark Weinstein, senior vice president for Governmental Affairs of Viacom Inc.; and Richard B. Rogers, counsel for the Antitrust and Public Policy arm of Ford Motor Company.

Mr. Silberman, it is my understanding that you would like to introduce Mr. Rill. Before you do that, Mr. Rill, I would like to get your opinion. Do you think we ought to repeal the antitrust exemption for baseball? [Laughter.]

Mr. RILL. Senator, I have only one antitrust exemption which is near and dear to my heart, and that is the one for baseball. [Laughter.]

[11] The SEC also has sought to encourage the development of like-minded regulatory systems through participation in international organizations, such as IOSCO and COSRA, as well as by providing training on enforcement and other issues to foreign securities authorities.

[12] Sec, 1993 Annual Report, at 23.

Senator METZENBAUM. Mr. Silberman, please proceed.

PANEL CONSISTING OF ALAN SILBERMAN, CHAIRMAN, ANTITRUST SECTION, AMERICAN BAR ASSOCIATION; JAMES RILL, COLLIER, SHANNON, RILL & SCOTT, FORMER ASSISTANT ATTORNEY GENERAL FOR ANTITRUST; MARK WEINSTEIN, SENIOR VICE PRESIDENT FOR GOVERNMENT AFFAIRS, VIACOM INC.; AND RICHARD B. ROGERS, COUNSEL, ANTITRUST AND PUBLIC POLICY, FORD MOTOR COMPANY

STATEMENT OF ALAN SILBERMAN

Mr. SILBERMAN. Mr. Chairman, Senator Thurmond, I am pleased to present the views of the ABA Section of Antitrust Law on the International Antitrust Enforcement act. As the written report on the proposed act that we have furnished to the committee states, the section and the International Law section of the ABA support the goals and the approach of the act.

As antitrust lawyers, we recognize that the focal point of competition is more often today the global market, and as good antitrust lawyers we recognize that enhancement of law enforcement on the same international basis goes hand in hand with market expansion. Our support for this legislation sits on two basic principles. First, that providing a framework for negotiating specific reciprocal agreements with notice and comment, the act allows for flexibility and fine-tuning in the public interest. And second, that effective safeguards to maintain confidentiality can be achieved by including principles of confidentiality in the legislation and in the MOU.

With those two introductory broad premises, I would ask my colleague Jim Rill to continue the presentation on behalf of the section.

Senator METZENBAUM. Mr. Rill, please proceed.

STATEMENT OF JAMES RILL

Mr. RILL. Thank you, Mr. Chairman.

Senator METZENBAUM. I might say, Mr. Rill, you had a distinguished record as the Assistant Attorney General for Antitrust. We were always able to work with you. I think you were under some limitations by reason of the political realities, but I think that you did a good job as the Assistant Attorney General.

Mr. RILL. Well, let me just respond to that. I think this is my first, perhaps second, appearance since I have left the office which I was very proud to have held. I want to commend you and Senator Thurmond for the support that you always gave the Antitrust Division, both of you, during the Bush administration. We were able to enhance our budget. We were able to pass joint venture legislation. We were able to pass an increase, substantial increase, in corporate criminal fines, and that is directly attributable to your work and Senator Thurmond's work on this committee. And I deeply appreciate it, and I know the division does, and I know my successor does.

Senator METZENBAUM. Thank you.

Mr. RILL. Thank you. We do endorse this legislation in large part because I think it will inevitably lead to the improved ability of the

U.S. antitrust enforcement agencies to attack violations occurring overseas that adversely affect U.S. consumers and the foreign commerce of the United States. Obviously, there is a dramatically sharply increased volume of business transactions that have international competition ramifications. While this growth applies to mergers, it also applies to joint ventures, intellectual property transfers, vertical distribution arrangements, and cartel activities including conduct occurring overseas that restrains U.S. foreign trade opportunities.

Concern with this conduct, of course, led us to repeal the now infamous Footnote 159 in the 1988 International Antitrust Guidelines and to take the position that the Antitrust Division would thenceforth be prepared to use the Sherman act in accordance with its jurisdiction to attack practices that occurred overseas but have the substantial and reasonably foreseeable adverse effect on U.S. foreign commerce opportunities.

Drawing, if I may, on my own experience as former Assistant Attorney General, I can say without qualification that U.S. DOJ enforcement was constrained to a significant degree by the inability to obtain discovery of information relating to overseas conduct of an antitrust nature. As you can understand, I cannot deal with specific cases or with the facts underlying specific investigations, but there were certain circumstances where we had reason to suspect private activity was restraining U.S. foreign commerce either by horizontal boycott or exclusive vertical arrangements tying up virtually an entire sector of the economy, but had to delay, to really abandon further action in those instances because the evidence existing overseas was difficult, indeed virtually impossible, to come by either with any reasonable timeframe or for that matter at all.

This legislation sponsored by you, Senator Thurmond and others will give the Department of Justice and the Federal Trade Commission the tools to obtain cooperation from their overseas counterparts and information sharing, to say, in effect, we are prepared to help you, but as a predicate you must give us the tools, the information, to assist us in our enforcement. In this light, it is clear to me and clear to those of us in the International section and the Antitrust section of the American Bar Association that this is not a give-away program. It is a means to enhance the vigorous enforcement of the U.S. antitrust laws.

And I am sure it is for this reason that I am advised by the Department of Justice that supporters of this legislation include American Airlines, Apple Computers, Bethlehem Steel, Chrysler, Inland Steel, USX, Viacom—here, of course, to testify today—and Xerox among others.

Now the concerns expressed by many, including yourself, Mr. Chairman, concerning the confidentiality of information given to foreign authorities are to be taken seriously. I can say that the Antitrust Division leadership and the American Bar Association Antitrust Section Task Force worked very closely together from February on to address these concerns, and I want to commend the Antitrust Division leadership for being so forthcoming and cooperative in responding to these concerns.

The provisions of the current bill go very far to ensure confidential treatment. Recommendations of the American Bar Association

are incorporated in the bill, provisions including the conditioning of agreements and information transfer on assurances that the foreign authority will provide confidentiality safeguards at least equal to those that apply in the United States, providing that the terms of each agreement be subject to notice and comment opportunity for the presentation of views, and requiring the repudiation of agreements where confidentiality safeguards are in what I truly think would be a rare situation violated.

In our opinion, these and other provisions should provide adequate assurance that sensitive documents and other materials will not be improperly released by foreign or for that matter U.S. agencies. I am confident that the leadership of the Antitrust Division and the Federal Trade Commission are committed to and will carefully and prudently exercise their judgment consistent with the language and strongly expressed spirit of this legislation. Thank you very much, Mr. Chairman and Senator Thurmond.

Senator METZENBAUM. Thank you very much. I think we will hold our questions until the entire panel has been heard.

[The report of the Section of Antitrust Law and the Section of International Law and Practice of the American Bar Association follows:]

PREPARED STATEMENT OF SECTION OF ANTITRUST LAW AND THE SECTION OF INTERNATIONAL LAW AND PRACTICE OF THE AMERICAN BAR ASSOCIATION

These views are presented on behalf of the Sections of Antitrust Law and International Law and Practice. They have not been approved by the Board of Governors or House of Delegates of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

Introduction

The Department of Justice has proposed legislation, the International Antitrust Enforcement Assistance Act of 1994 (the "IAEAA "),[1] that would make possible broad-ranging cooperation in antitrust enforcement between the United States and other nations. The bill, which was introduced by Senators Howard Metzenbaum and Strom Thurmond in the Senate,[2] and Congressmen Jack Brooks and Hamilton Fish in the House, on July 19, 1994, would authorize the Attorney General and Federal Trade Commission ("FTC") to enter into bilateral agreements with competition agencies in foreign jurisdictions for assistance in antitrust investigations and the sharing of information to assist in antitrust enforcement. Specifically, the IAEAA would allow, but not require, investigatory cooperation and information sharing by the United States in aid of foreign antitrust agencies, conditioned on advance reciprocal undertakings of cooperation and subject to certain confidentiality safeguards.

The Department of Justice ("DOJ") and FTC have been frustrated by their inability to investigate fully and effectively anticompetitive conduct occurring overseas. Too often, foreign governments are unwilling to cooperate in U.S. antitrust investigations. The IAEAA is designed to induce foreign governments to cooperate in U.S. antitrust investigations. It addresses a concern expressed by enforcement authorities that there are serious impediments to effective enforcement of competition laws against conduct that may occur beyond the borders of the country in which the relevant enforcement agency operates or that involve documents or other information located overseas and in the possession of a sister agency. In such cases, DOJ and FTC have stated that effective antitrust enforcement has been severely impaired by the inability of the antitrust bodies of various nations to cooperate with one another in the conduct of investigations.

Restrictions on disclosure of information by the FTC or DOJ impair their ability to assist foreign agencies and, therefore, the ability of U.S. agencies to seek reciprocal cooperation from foreign competition authorities. For example, as discussed

[1] S. 2297 and H.R. 4781.

[2] Additional bipartisan Senate sponsors include Senators Kennedy, Biden, Leahy, Simon, Simpson, and Grassley.

below, current law in the United States narrowly limits the extent to which compulsory investigatory process can be used by the DOJ and the FTC in aid of another nation's antitrust investigation. By the same token, statutory limitations on disclosure of grand jury materials, information submitted under the Hart-Scott-Rodino Act, and materials obtained pursuant to civil investigative demands or FTC compulsory process greatly restricts information sharing with foreign agencies. With respect to cooperation, the Antitrust Section's Special Committee on International Antitrust concluded:

> In order for such [cooperative] consultation to be informed and effective, the agencies must be able to discuss fully the facts of the transaction in question. This requires an amendment in the confidentiality laws of the different jurisdictions to permit interagency disclosure. We recommend such amendment, subject to adequate safeguards that all information thus disclosed remain confidential to the agencies receiving it. [American Bar Association Section of Antitrust Law, *Report of the Special Committee on International Antitrust,* page 169, September 1, 1991.]

Similarly, the Antitrust Section's NAFTA Task Force highlighted the importance of information sharing among competition authorities:

> The most significant obstacle to effective cooperation and coordination among competition authorities is the restriction on information sharing imposed by statutory confidentiality requirements * * *. Provided that the parties implement adequate measures to safeguard the confidentiality of information communicated by one competition authority to another, extensive information sharing between competition authorities would greatly enhance the efficiency and effectiveness of competition law enforcement within the free trade area. [American Bar Association Section of Antitrust Law, *NAFTA Task Force Report,* 228–229 (July 18,1994.)]

The IAEAA is designed to facilitate the provision of such assistance by the DOJ and the FTC. The agencies anticipate that in return for this cooperation by the United States, foreign agencies will provide assistance to the DOJ and FTC, thereby enhancing U.S. antitrust enforcement.

There are now substantial impediments to the ability of the U.S. antitrust agencies to reach anticompetitive conduct occurring overseas that has a direct, substantial, and reasonably foreseeable effect on the foreign commerce of the United States.[3] According to Assistant Attorney General Anne K. Bingaman:

> Unfortunately, the traditional mechanisms available to U.S. enforcement officials for obtaining foreign-located antitrust evidence are not sufficient to meet the needs of modern antitrust enforcement. For example, an attempt to obtain information through a letter rogatory procedure could conceivably involve disclosure of sensitive facts to several layers of bureaucracy within the requested country, months of deliberation, and no results. [*See* Address by Anne K. Bingaman before the World Trade Center Chicago Seminar, p. 11 (May 16, 1994)].

It is essential that the U.S. government be able to offer reciprocal cooperation in order to strengthen its own enforcement abilities with respect to overseas conduct.

There have been many instances in which U.S. antitrust investigations have faltered or even failed as a consequence of the inability of the DOJ or FTC to obtain evidence from abroad. The Justice Department's paper providing background information on the IAEAA states that two recent cartel investigations were abandoned because the Antitrust Division was unable to secure evidence located in foreign countries from the suspected cartel participants, despite excellent relationships with the foreign government involved.[4] However, there have also been cases that have been facilitated by cooperation from foreign governments, and these cases provide the incentive to secure such cooperation from other foreign governments. The IAEAA seeks to maximize the opportunities for effective cooperation among antitrust authorities, and thereby enhance antitrust enforcement in the U.S. and in foreign countries.

The Task Force supports the objectives and direction of the proposed legislation. As introduced, the IAEAA addresses many of the concerns of the Task Force. Most significantly, the Task Force supports the provisions in the bill as introduced that

---

[3] Under the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a, U.S. courts have antitrust jurisdiction over such conduct.

[4] The International Antitrust Enforcement Assistance Act of 1994, Department of Justice Explanation.

strengthen substantially the assurance that a foreign agency receiving otherwise confidential information from the United States will safeguard the confidentiality of that information. At a minimum, foreign agencies should provide protections at least equivalent to those in force under U.S. law and the rules and practices of the DOJ and FTC. Congress should legislate broad parameters of confidentiality, but rather than enumerating specific safeguards in legislation, Congress should provide that the Department of Justice, in consultation with the FTC, would by rulemaking prescribe standards for reasonable assurances of confidential treatment that would be a necessary predicate to any investigatory cooperation or information sharing. Those standards also would be contained in bilateral agreements between U.S. agencies and foreign agencies. In addition, the Task Force recommends several other amendments.

I. ELEMENTS OF PROPOSAL

The proposed legislation has two principal thrusts: (1) to authorize reciprocal cooperation in antitrust investigations; and (2) to provide for reciprocal sharing of documentary and other information in the possession of the U.S. antitrust enforcement agencies which is not otherwise disclosable. Cooperation and information sharing are not made mandatory by the legislation, but would be dependent upon negotiation of bilateral agreements[5] with a foreign antitrust regulator and a determination by the Attorney General with respect to investigatory cooperation, and by the Attorney General or Federal Trade Commission with respect to information sharing, that: (1) the foreign agency in question would provide cooperation and information on a reciprocal basis; (2) the foreign agency would provide reasonable assurances of protection of confidential information provided to it; and (3) the cooperation or disclosure is in the public interest.

A. U.S. cooperation in foreign investigations

One of the major provisions of the IAEAA deals with the conduct of investigations in aid of foreign antitrust authorities, and involves only conduct by the Attorney General, not the Federal Trade Commission. The apparent reason for this limitation is that the refusal to provide investigatory cooperation on the ground of inconsistency with the public interest could involve foreign policy considerations, which are uniquely within the province of the Executive Branch.

The IAEAA authorizes cooperation with foreign authorities, including such supranational authorities as the European Union, with respect to an investigation into whether any person is violating or is about to violate any of their laws or rules relating to "antitrust matters," which is defined to mean any law or regulation prohibiting conduct similar to that prohibited by the antitrust laws as defined in 15 U.S.C. § 12 *or* as an unfair method of competition (not a deceptive act or practice) under Section 5 of the FTC Act, 15 U.S.C. § 45. Cooperation may occur regardless of whether:

- The possible violation being investigated is subject to criminal or civil sanctions;
- The conduct is also a violation of U.S. laws; or
- The U.S. is conducting or is likely to conduct an investigation regarding a violation of U.S. law.

A major mechanism for cooperation under the proposed legislation is the civil investigative demand ("CID ") authority under the Antitrust Civil Process Act, 15 U.S.C. § 1312. That statute would be amended, in part, by authorizing the Attorney General to issue civil investigative demands to investigate the alleged violation of any law or rule relating to antitrust matters administered or enforced by a foreign antitrust authority. Although the provision of information obtained by CID to the relevant foreign authority is not expressly permitted under the IAEAA, it may be implied as obvious in the context of the legislation or covered by the information-sharing provision.[6] The legislation also would provide, as an alternative, a form of 28 U.S.C. § 1782, which currently permits U.S. courts to enter orders for taking testimony for proceedings pending in foreign tribunals.[7] It would make clear that that

---

[5] The Task Force recommends that the IAEAA specifically authorize and require such bilateral agreements as a condition for cooperation. *See p.____ infra.* As introduced, the bill requires such agreements.

[6] The Task Force recommends that the bill be amended to authorize explicit disclosure to foreign antitrust authorities of information obtained through CIDs. *See* pp. 8–9 *infra.*

[7] *See* p. 14 *infra.*

provision applies to assistance to foreign agencies as well as "tribunals" by means of court-ordered investigatory process.

B. Disclosure of information

The second major aspect of the proposed IAEAA deals with the possible reciprocal disclosure of otherwise confidential information to foreign antitrust authorities and covers information in the possession of either the Department of Justice or the Federal Trade Commission. The measure would override every provision of law restricting disclosure of information by the FTC or DOJ, except the HSR Act.

Disclosure of evidence would be authorized to assist a foreign antitrust authority in investigating matters that violate the laws or rules administered by that authority. A court order would be required to authorize the disclosure of matters occurring before a grand jury.

As with assistance in investigations, as now drafted, disclosure of information under the IAEAA would be conditioned on the Attorney General or the FTC authorizing disclosure after taking into account reciprocity, the public interest, and adequate assurances regarding the protection of confidential information.

C. Protection of information obtained from foreign agencies

The legislation would create a new exemption from the Freedom of Information Act, 5 U.S.C. § 552, providing that information received from foreign authorities is not subject to the mandatory disclosure requirements of the statute. In addition, the IAEAA would provide that materials received from a foreign authority may not be disclosed in a manner inconsistent with assurances given by the Attorney General or FTC.

II. LIMITS UNDER CURRENT LAW ON DISCLOSURE OF INFORMATION OBTAINED BY U.S. ANTITRUST ENFORCEMENT AGENCIES

Several statutory provisions safeguard the confidentiality of information obtained by the federal antitrust enforcement agencies in the U.S., including the Hart-Scott-Rodino Act (15 U.S.C. § 18a(h)), the Antitrust Civil Process Act (15 U.S.C. § 1313(c)(3)), the Federal Trade Commission Act (15 U.S.C. §§ 41, *et seq.*), the Trade Secrets Act (18 U.S.C. § 1905), and Federal Rule of Criminal Procedure 6(e). Under current law, these provisions preclude DOJ and the FTC from providing information to other non-federal antitrust enforcers, such as foreign antitrust authorities or state attorneys general.

A. Confidentiality of information obtained pursuant to premerger notification under the Hart-Scott-Rodino Act

When the Hart-Scott-Rodino Act was enacted in 1976, strong statutory protections of confidentiality were included to induce cooperation by the merging firms. The HSR Act has been a success and firms are willing to disclose highly sensitive business information to DOJ and the FTC because the business community has confidence that information disclosed will be kept confidential. Section 7A(h) of the Clayton Act imposes confidentiality restrictions on both the Federal Trade Commission and the Department of Justice in connection with information received by those agencies from parties to a merger or acquisition in connection with statutory premerger notification requirements.[8] That provision limits the disclosure of such material in the following terms:

> Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempted from disclosure under § 552 of Title 5, and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this section is intended to prevent disclosure to either body of Congress or to

[8] This provision has generated considerable controversy between the federal enforcement agencies and state attorneys general. In *Mattox* v. *Federal Trade Commission,* 752 F.2d 116 (5th Cir. 1985), and *Lieberman* v. *Federal Trade Commission,* 771 F.2d 32 (2nd Cir. 1985), the courts concluded that Section 7A(h) prevents the antitrust enforcement agencies from making HSR materials available to the state attorneys general or to any other person or entity except as prescribed by statute. As a result of these decisions, confidentiality is preserved and the materials protected from disclosure, without the consent of the submitting parties, other than to Congress or committees or subcommittees of Congress.

The committees of the U.S. Senate and House of Representatives typically have procedural rules whereby the disclosure of information is governed. *See, e.g.,* Senate Manual, Sen. Comm. on Rules and Admin., 102d Cong., 1st Sess. 53 (1992). As a consequence, the ordinary circumstance is that the committee or subcommittee must vote by a majority to obtain the information; agencies need not honor the request of an individual member of the Senate or House.

any duly authorized committee or subcommittee of the Congress. [15 U.S.C. § 18a(h)].

The parties submitting premerger notification information may waive confidentiality protections so information may be disclosed on a limited basis. A protocol for the provision of such information pursuant to waiver has been adopted by the Department of Justice and by the Federal Trade Commission and provides that the material submitted by merging parties could voluntarily be turned over to State antitrust enforcement agencies pursuant to a letter provided by the merging parties waiving confidentiality provisions to the extent necessary to permit coordinated enforcement between the Department and the relevant State agency.[9]

As introduced, the IAEAA expressly excludes HSR materials from the documents and information that may be disclosed to foreign agencies. In the future, if international coordination of merger investigations is to be achieved, some means of sharing confidential HSR information with foreign antitrust agencies must be developed.

B. Materials obtained through civil investigative demands

The confidentiality of information obtained by the U.S. Department of Justice by CIDs is protected by the Antitrust Civil Process Act:

Except as otherwise provided in this section, while in the position of the custodian, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, so produced shall be available for examination without the consent of the person who produced such material, answers, or transcripts, and, in the case of any product of discovery produced pursuant to an expressed demand for such material, of the person for whom the discovery was obtained, by any individual other than a duly authorized official, employee, or agent of the Department of Justice. Nothing in this section is intended to prevent any disclosure to either body of the Congress or to any authorized committee or subcommittee thereof. [15 U.S.C. § 1313(c)(3)].

There is little authority construing Section 13 13(c)(3). It appears to be co-extensive both in its coverage and in its exceptions with the comparable provisions of the HSR Act. One court has interpreted Section 1313(c) as affording adequate protection against disclosure to third parties such that a party issued a CID could not avoid compliance on the basis that the documentation it was being forced to produce contained confidential proprietary information.[10]

C. Materials obtained by the FTC

The general investigatory powers of the Federal Trade Commission are set forth in Section 6(f) of the FTC Act, 15 U.S.C. § 46(f), which prohibits disclosure to the "public" of trade secrets, confidential commercial or financial information, privileged commercial or financial information, line-of-business data, and subpoenaed documents.[11] FTC regulations undertake to define "trade secrets and commercial and financial information" and apply to:

> Competitively sensitive information, such as costs or various types of sales statistics and inventories. It includes trade secrets in the nature of formulas, patterns, devices, and processes of manufacture as well as names of customers in which there is a proprietary or highly competitive interest. [16 C.F.R. § 4.10(a)(2)].

Moreover, Section 14 of the FTC Act, which applies to "any document or transcript of oral testimony received by the Commission pursuant to the compulsory process in an investigation * * * [regarding] any provision of the laws administered by the Commission," affords confidentiality as follows:

> Except as otherwise provided in this section, while in the possession of the custodian, no documentary material, reports or answers to questions, and transcripts of oral testimony shall be available for examination by any individual other than a duly authorized officer or employee of the Commission without the consent of the person who produced the material or transcripts. Nothing in this section is intended to prevent disclosure to either

---

[9] U.S. Department of Justice, *Justice Department Announces New Procedure to Coordinate Merger Antitrust Investigation with States* (Mar. 6, 1992) (press release); FTC Notice, 57 Fed. Reg. 21795 (1992). However, even the protocol permits only disclosure of the HSR filings and not additional information gathered by DOJ or the FTC during the investigation.

[10] *In re Emprise Corporation*, 344 F. Supp. 319 (W.D.N.Y. 1972).

[11] *See generally* ABA Antitrust Section Working Paper, *The Treatment of Confidential Information by the Federal Trade Commission* (1990).

> House of the Congress or to any committee or subcommittee of the Congress, except that the Commission immediately shall notify the owner or provider of any such information of a request for information designated as confidential by the owner or provider. [15 U.S.C. § 57b-2(c)].

Not included within the prohibition against disclosure in Section 14, however, are Congress and federal and state law enforcement authorities, providing the latter furnish satisfactory assurances of confidentiality.

D. Prohibition against disclosure of trade secrets

18 U.S.C. § 1905 prohibits the disclosure of "trade secrets, processes, operations, style of work, or apparatus or the identity of confidential statistical data, a minor source of income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association * * *" It also imposes criminal penalties for violations.

E. Federal rules of criminal procedures 6(e)

Federal Rules of Criminal Procedure 6(e)(2) codifies the common law rule that permits disclosure of *"matters occurring before the grand jury"* only "when so directed by the court preliminary to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e) (emphasis added). *See generally* ABA Antitrust Section, *Antitrust Evidence Handbook* 81–87 (1991). Under Rule 6(e), a litigant must demonstrate "particularized need" to obtain grand jury transcripts for use in another judicial proceeding. *Id.* Rule 6(e) contains five exceptions to the general rule on non-disclosure:

> a. Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—
>
> (1) an attorney for the government for use in the performance of such attorney's duty; and
>
> (2) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.
>
> * * * * *
>
> Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
>
> (1) when so directed by a court preliminarily to or in connection with a judicial proceeding;
>
> (2) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; or
>
> (3) when the disclosure is made by an attorney for the government to another federal grand jury.

Significantly, Rule 6(e) does not impose any obligation of secrecy on grand jury witnesses. Nor does it preclude production of documents produced to the grand jury, provided the documents are sought from the producing party. *Id.* Although the language of Rule 6(e) is ambiguous regarding foreign governments, the Ninth Circuit has rejected the notion that disclosures to foreign governments could be made by U.S. government attorneys. *In re Federal Grand Jury Witness (Lemieux),* 597 F.2d 1166, 1168 (9th Cir. 1979). Instead, the court concluded that disclosure to foreign authorities requires a U.S. District Court to order disclosure. The parties seeking disclosure must satisfy a three part test:

- The material must be sought to avoid possible injustice in another judicial proceeding;
- The need for disclosure must outweigh the need for continued secrecy; and
- The disclosure request must be limited to the material necessary to avoid injustice.[12]

The U.S. Supreme Court has indicated, however, that convenience or cost savings alone will not satisfy the test and that the requesting party must first exhaust traditional discovery and investigation techniques. *Smith* v. *United States,* 423 U.S. 1303, 1304–05, *stay vacated on other grounds,* 423 U.S. 810 (1975); *United States* v. *Sells Engineering, Inc.,* 463 U.S. 418, 431–35 (1983).

---

[12] *See generally* ABA Antitrust Section, Antitrust Evidence Handbook 81–87 (1991); Note, *Disclosure of Grand Jury Materials to Foreign Authorities Under Federal Rule of Criminal Procedure 6(e),* 70 Va. L. Rev. 1623, 1629 (1984) (*citing Douglas Oil Co.* v. *Petrol Stops Northwest,* 441 U.S. 211 (1979), and *United States* v. *Baggot,* 463 U.S. 476 (1983).

More recently, however, disclosure of materials produced in response to a grand jury subpoena to foreign enforcement officers has occurred where the materials were in the possession of the U.S. attorney, but not yet presented to the grand jury. Courts have allowed the disclosure because the materials were not yet in the possession of the grand jury, and therefore were found not to be subject to Rule 6(e). *See, e.g., United States* v. *Peters,* 791 F.2d 1270 (7th Cir.), *cert. denied,* 479 U.S. 847 (1986); *see generally* Note, *supra.*

The testimony of many grand jury witnesses is compelled over an assertion of the Fifth Amendment privilege against self-incrimination through grants of statutory immunity. *See* ABA Antitrust Section, Antitrust Evidence Handbook 106–8 (1991). Statutory immunity precludes U.S. prosecution of the grand jury witness based on evidence derived from the immunized testimony. *Id.* However, if a witness' immunized grand jury testimony is disclosed to a foreign antitrust agency with criminal prosecution authority (such as Canada), the IAEAA contains no provisions to insure that the witness will not be prosecuted in the foreign jurisdiction based on immunized testimony before a U.S. grand jury. The Task Force recommends that this deficiency be addressed through amendments designed to insure that immunized U.S. witnesses receive equivalent immunity from any foreign antitrust agency to whom their testimony is disclosed.[13]

III. PRECEDENT FOR PROPOSAL AND EXISTING MEANS OF COOPERATION

A. Securities law cooperation

Representatives of the Department of Justice have stated that the proposed IAEAA is patterned after legislation enacted in 1988 providing for international cooperation in securities law enforcement. The 1988 statute empowers the SEC to investigate on behalf of a foreign securities authority:

> On request from a foreign securities authority, the Commission may provide assistance in accordance with this paragraph if the requesting authority states that the requesting authority is conducting an investigation which it deems necessary to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces. The Commission may, in its discretion, conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance. Such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States. In deciding whether to provide such assistance, the Commission shall consider whether (A) the requesting authority has agreed to provide reciprocal assistance in securities matters to the Commission; and (B) compliance with the request would prejudice the public interest of the United States. [15 U.S.C. § 78n(a)(2)].

Additional legislation was enacted in 1990 to strengthen further international cooperation in the enforcement of securities laws. It provides that:

> The Commission may in its discretion and upon a showing that such information is needed provide all "records"* * * and other information in its possession to such persons, both domestic and foreign, as the Commission by rule deems appropriate if the person receiving such records or information provides such assurances of confidentiality as the Commission deems appropriate. [15 U.S.C. § 78x(c)].

Executive Agreements have been entered into between the U.S. and approximately 15 foreign authorities under this legislation.[14] The SEC has received sub-

---

[13] Section 4(c) of the IAEAA provides that "a person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable right or privilege." However, the term "privilege" is not defined. The Task Force recommends an amendment to require an assurance that an immunized grand jury witness cannot be criminally prosecuted by a foreign antitrust agency based on immunized testimony. In addition, the term "privilege" should be clarified to insure that other privileges, such as the attorney-client privilege, are given their full scope by a foreign agency. At present, some foreign jurisdictions, such as the EC, do not recognize the attorney-client privilege to the same extent as the U.S.

[14] Similar legislation has been enacted by several other countries, including the U.K., France, Japan, the Netherlands, Australia, Mexico, and some Canadian provinces.

stantial cooperation in its investigations from foreign governments. The SEC makes more than 200 requests for foreign assistance each year.[15]

B. 28 U.S.C. § 1782

An existing U.S. law, 28 U.S.C. § 1782, authorizes the federal courts to enter orders for the taking of testimony and other information gathering for potential use in a proceeding before a foreign "tribunal." It constitutes the principal existing mechanism whereby foreign authorities might secure evidence in the United States to assist their investigation of possible foreign-law violations.

However, this provision is limited in several respects. First, it is not clear whether a foreign authority operating purely through administrative process without judicial involvement would constitute a tribunal for purposes of Section 1782. Second, certain investigative process available to U.S. agencies, such as the Antitrust Civil Process Act, would not be available to foreign authorities since that process is limited to use in investigation of offenses under the U.S. antitrust laws. Finally, the requirement of a court order in each instance involves some element of delay in the investigatory process. As a result, CIDs and court ordered discovery are not now practically available to assist in foreign investigations.

C. Mutual legal assistance treaties

The United States has entered into approximately 20 Mutual Legal Assistance Treaties ("MLATs ") with foreign authorities providing for cooperation in investigations of criminal conduct, which may include antitrust offenses. *See* Remarks of Assistant Attorney General Anne K. Bingaman before the World Trade Center Chicago Seminar, p. 12 (May 16, 1994). The most significant such agreement, which expressly includes antitrust offenses, is the Treaty on Mutual Legal Assistance in Criminal Matters between the United States and Canada. It provides for cooperation in criminal investigations, including use of process and the exchange of documents and other materials obtained through the grand jury process. A court order is required for materials subject to Rule 6(e). This agreement is being actively implemented. *See* Address of Assistant Attorney General Anne K. Bingaman before the World Trade Center Chicago Seminar,*supra,* at 12.

The U.S.-Canadian MLAT has proved to be a significant aid to U.S. antitrust enforcement. With the assistance of the Canadian government, DOJ has secured evidence essential to criminal antitrust prosecutions. Most recently, DOJ indicted Japanese firms for conspiring to fix the price of thermal fax paper, based in part on information from the Canadian government, which filed similar charges.[16]

However, the MLATs have limitations that prevent them from being fully effective mechanisms of enforcement cooperation. First, they are limited to criminal enforcement. Nations and multinational bodies that do not have statutes with criminal sanctions are likely to be averse to cooperating in U.S. antitrust investigations looking to criminal prosecution. It is doubtful, moreover, whether under an MLAT, the U.S. Antitrust Division could cooperate with a civil antitrust investigation being conducted by a foreign agency. In addition, treaties such as the MLATs require extensive multi-agency involvement and, in the United States, ratification by the Senate. As a result, the process is time-consuming and somewhat cumbersome.

The important point, however, is that DOJ's experience under the MLATs strongly suggests that reciprocal antitrust investigatory cooperation is possible and can be effective. Indeed, experience under the MLATs, as well as frustration over investigations that failed when foreign evidence proved unavailable, motivated DOJ to propose the IAEAA.

D. Existing U.S. agreements for antitrust cooperation

The U.S. and several other industrialized nations have negotiated executive agreements for cooperation that provide partial models for the bilateral agreements contemplated by the IAEAA.

---

[15] Letter dated June 13, 1994, to Deputy Assistant Attorney General Diane Wood from Michael D. Mann, Director of Office of International Affairs, the Securities and Exchange Commission.

[16] *United States* v. *Kanzaki Specialty Papers, Inc.*, Crim. No. 94–10176NMG (D.Mass. July 14, 1994). Similarly, DOJ recently indicted manufacturers of plastic tableware based in substantial part on evidence obtained by the Canadian government at the request of DOJ. Wash. Post (June 10, 1994).

An agreement was negotiated with Germany in 1976.[17] It provides for notification and consultation between governments when an antitrust investigation or proceeding "will be likely to affect important interests of the other party" and consultations will be held "to the extent appropriate under the circumstances." Similar agreements exist between the U.S. and Canada[18] and between the U.S. and Australia.[19]

Most recently, the U.S. and the EC entered into an agreement for cooperation and deference, including the exercise of positive comity, in antitrust and competition matters.[20] However, it expressly does not authorize the sharing of information protected by statutes or regulations of either party. Nor does it provide for use of compulsory process at the request of the other party. As a consequence, its utility has been somewhat limited.[21] Nonetheless, DOJ and the EC recently settled jointly monopolization/abuse of dominant position claims against Microsoft.[22]

While these agreements generally authorize consultation and cooperation, they have fallen short of the goal of promoting effective enforcement because they fail to authorize the sharing of confidential information that either signatory has gathered during an investigation. Nor do they provide for positive cooperation in information gathering at the request of either signatory. These are the gaps that the IAEAA seeks to fill.

IV. RECOMMENDATIONS

A. Potential benefits of the legislation

The Task Force recommends that the Antitrust Section support enactment of the IAEAA, subject to certain modifications. The information-sharing provision of the IAEAA is fully consistent with the recommendations of the Report of the Section's 1991 Special Committee on International Antitrust and the Section's 1994 NAFTA Report.[23] (*See p. 2 supra.*) Moreover, the investigatory cooperation proposal stems from the same goal of enhancing cooperation and effective enforcement between competition agencies with respect to conduct having transnational raifications. This objective is also consistent with the conclusion of the Report of the Special Committee on International Antitrust and the NAFTA Report that convergence in enforcement and administrative process and procedure is a primary desirable step in the elimination of costs and frictions in the governmental assignment of competition. American Bar Association Section of Antitrust Law, *Report of the Task Force on the Competition Dimension of the North American Free Trade Agreement* (March 25, 1994); American Bar Association Section of Antitrust Law, *Report of the Special Committee on International Antitrust* (Sept. 1, 1991).

There also are several other benefits that could result from the enactment of the IAEAA.

---

[17] Agreements Between the Government of the United States and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, *reprinted in* 772 Antitrust & Trade Reg. Rep. (BNA) D–1 (July 13, 1976).

[18] Memorandum of Understanding Between the Government of the United States and the Government of Canada as to Notification, Consultation and Cooperation with Respect to Application of National Antitrust Laws, *reprinted in* 46 Antitrust & Trade Reg. Rep. (BNA) 560 (March 15, 1989).

[19] Agreement Between the Government of the United States and the Government of Australia Relating to Cooperation on Antitrust Matters, *reprinted in* 43 Antitrust & Trade Reg. Rep. (BNA) 36 (July 1, 1982).

[20] Agreement Between the Government of the United States and the Commission of the European Communities Regarding the Application of Their Competition Laws (Sept. 23, 1991), *reprinted in* 61 Antitrust & Trade Reg. Rep. (BNA) 382 (Sept. 26, 1991). The validity of this Agreement is currently in doubt because of litigation pending before the European Court of Justice.

[21] For example, the FTC and EC consulted concerning about such issues as product and geographic market definition in the proposed DuPont-ICI transaction. But their ability to discuss other issues was limited to matters not subject to confidentiality requirements. Recently, the EC and DOJ asked the parties to a proposed merger to waive HSR Act confidentiality requirements to permit more extensive cooperation with the EC.

[22] Wash. Post A1 (July 18, 1994). The U.S.-EC coordination was achieved with the consent of Microsoft.

[23] The proposed legislation is also consistent with recommendations of the Organization for Economic Cooperation and Development, which has long recommended more cooperation among member nations in competition law matters. In 1979, the OECD issued a report that recommended information sharing among members. OECD, *Concentration and Competition Policy* (1979). In 1978, an OECD Council recommendation urged members to disclose information, subject to appropriate safeguards, unless cooperation would be contrary to significant national interests. OECD, *Recommendation of the Council Concerning Action Against Restrictive Business Practices Affecting International Trade Including Those Involving Multinational Enterprises* (Aug. 9, 1978).

First, and perhaps most important, the proposed legislation will strengthen the ability of the Antitrust Division and FTC to attack conduct overseas that violates U.S. antitrust laws. As a result, it will assist their efforts to protect U.S. consumers. Because they will be able to offer meaningful reciprocal cooperation to foreign agencies, it is more likely that the DOJ and FTC can induce many of their foreign counterparts to enter into genuine cooperation efforts to enhance both U.S. and foreign antitrust enforcement. If this goal is realized, it could provide a more meaningful mechanism for challenging private restraints on competition here and abroad that block market access to U.S. firms.

Second, more effective antitrust law enforcement should help all markets—both in the U.S. and abroad—operate more efficiently. Eventually, more effective foreign antitrust enforcement against foreign cartels and other barriers to entry, might help open foreign markets to U.S. firms. Foreign firms that restrict access to their markets by U.S. firms could be held accountable under foreign competition laws based on information provided by U.S. antitrust agencies. This could help "level the playing field" in international trade because foreign firms, like their U.S. counterparts, would be subject to more vigorous antitrust enforcement.

Finally, the better coordination sought by both elements of the proposal could produce better, more rational outcomes in dual investigations. Improved investigatory cooperation and data sharing facilitate an in-depth, thoughtful exchange of views and understanding of transnational implications of enforcement action. Resultant governmental action, by U.S. as well as foreign enforcers, would likely be better informed and hence be less intrusive than in the absence of such mutual deliberation.

The key to realizing the goal of the IAEAA, of course, is the willingness of foreign governments to enter into agreements providing for genuine reciprocity. The Task Force did not believe its purview included the practical question of whether that reciprocity would readily be forthcoming. Nonetheless, it seems clear that for the proposal to be both effective and acceptable to various U.S. constituencies, the DOJ and the FTC would need to secure express commitments from their foreign counterparts of genuine reciprocal undertakings and have a high degree of confidence that these undertakings would be honored.

B. Confidentiality concerns

The Task Force's principal concern about the IAEAA is the extent to which a foreign antitrust agency will safeguard the confidentiality of information received from the DOJ or the FTC. The IAEAA requires the U.S. agencies to take into account whether the foreign agency will give "adequate protection" to confidential information "at least equivalent to the treatment" under U.S. law. As introduced, the bill addresses many of the concerns of the Task Force about confidentiality. The Task Force applauds DOJ for its responsiveness to these concerns.

Adequate safeguards to protect the confidentiality of sensitive business information are of paramount concern, and the Antitrust Section's support for this kind of legislation is contingent upon having adequate protection. Confidential information is accorded the very highest protection by the U.S. antitrust enforcement agencies. The business community through the years has developed great confidence that sensitive competitive records turned over to the agencies will not be disclosed to outsiders, especially to competitors. U.S. firms would expect an equivalent level of protection in the international arena for business records turned over to foreign enforcement authorities or used in foreign tribunals.

This overriding need for confidentiality in any international exchange program cannot be overstated. The global nature of competition today, and the intense rivalry that exists between U.S. and foreign firms, both in the United States and throughout the world, makes this a paramount issue. If sensitive business records of a U.S. company were provided to a foreign competitor by its government, the consequences for the U.S. firm could be grave. Strategic plans, new product and cost information, and competitive analyses are a few of the types of information whose disclosure to competitors could cause irreparable harm to U.S. firms.

Therefore, while the concept of international information exchanges to enforce the competition laws is commendable, the Task Force believes the IAEAA must address this fundamental concern and safeguards must be included in the legislation.

The IAEAA should specify broadly the parameters of confidentiality assurances that would be a prerequisite to information sharing by U.S. agencies. Such requirements might include the following:

- The statutory or regulatory confidentiality safeguards available to foreign agencies;

- The limited scope of mandatory disclosure under foreign laws or regulations, *e.g.* disclosure to other agencies or use in regulatory proceedings;[24]
- The enforcement mechanisms and sanctions (criminal or otherwise) for violation of foreign confidentiality laws or rules and the foreign agency's commitment to their enforcement;
- The availability of processes for confidential use of information by the foreign agency, *e.g. in camera review procedures;*
- A requirement that access to U.S. information be terminated in the event confidential U.S. information is not protected,[25] but subject to an opportunity for the foreign agency to cure the deficiencies that allowed disclosure;
- An explicit assurance that the information will not be used for commercial purposes;
- Where firms that compete with U.S. firms are wholly or partially owned by a foreign government, there should be special protections against disclosure;
- The foreign agency should undertake not to disclose confidential information except to the extent necessary to enforce its antitrust laws and to assist the producing party in seeking confidential treatment;
- In order to insure that confidentiality is protected, the bill should state explicitly that no confidential information can be disclosed unless, through the bilateral agreement and otherwise, DOJ and FTC are confident that the foreign agency will afford the disclosed information the level of confidentiality required by the IAEAA; and
- If DOJ and FTC are aware of any provisions of the law of the foreign jurisdiction to whom the information will be disclosed that call into question its ability to maintain confidentiality, those provisions should be described in the notice requesting public comments.

Many of these provisions have been included in the bill as introduced. Those matters not addressed should be added through amendments. In addition, references to the importance of confidentiality should be added to the bill's preamble.[26]

Nonetheless, while the bill should emphasize the importance of confidentiality and provide minimum confidentiality standards, it seems unnecessary for Congress to resolve detailed confidentiality issues through the legislative process. Instead, the Task Force recommends that the legislation be amended to provide that the bilateral agreements executed by the U.S. agencies require explicit and detailed assurances that documents and other information will be protected.[27] The Task Force further recommends that the bill be amended to require that the scope of acceptable assurances be identified in regulations to be issued by the Department of Justice, in consultation with the FTC, after notice and opportunity for comment.[28]

C. Other suggested amendments

In addition, the Task Force recommends several other amendments to the IAEAA.

First, as noted above, as drafted the bill refers to bilateral agreements only in passing. The IAEAA should specifically authorize and require execution of bilateral agreements for reciprocal cooperation and information sharing as a condition for U.S. cooperation and information sharing.[29] Such agreements should contain explicit and detailed confidentiality provisions. Even after execution of such agreements, prior to disclosure of information by U.S. agencies, they would be required to evaluate the likelihood of reciprocal cooperation, confidentiality, and whether cooperation

---

[24] This may pose a particular problem in the European Union because information disclosed to the European Commission must be disclosed to all member states.

[25] In the event a U.S. agency learns that foreign disclosure has occurred, it should so advise the U.S. firm that produced the documents or information.

[26] The bill introduced in the Senate adopted the Task Force's suggested addition of the following two findings to the preamble of the IAEAA:

(6) The effectiveness of antitrust enforcement in the United States has been enhanced by government guarantees of confidentiality, which encourage the v luntary disclosure of business information; and

(7) Credible guarantees of confidentiality from foreign antitrust authorities are essential for the preservation of competition and the continued effective collection of business information.

[27] This recommendation is consistent with the recommendations of the Section's 1994 NAFTA Report, which stresses the need for confidentiality.

[28] The Task Force believes there should be formal notice and comment rulemaking proceedings, subject to judicial review. The bill as introduced requires public notice and comment as to proposed agreements, but no judicial review.

[29] For example, Sections 4 and 5 of the bill should refer to such agreements as a condition for U.S. cooperation or assistance.

or disclosure is in the public interest. As introduced, the bill addresses some of these issues.

Second, the IAEAA should authorize explicitly disclosure to foreign competition agencies of information obtained through CIDs or FTC compulsory process.

Third, the Task Force recommends that disclosure of immunized grand jury testimony be conditioned on assurances that the immunized witness cannot be criminally prosecuted by the foreign agency based on the immunized testimony.

Fourth, the Task Force recommends that the term "privilege" be defined to assure that foreign antitrust agencies accept the broadest applicable scope of privileges (as recognized either in the U.S. or the foreign jurisdiction), such as the attorney-client privilege, for materials disclosed pursuant to the IAEAA.

Finally, in order to allow Congress to evaluate the utility of the legislation and the extent to which foreign agencies have maintained the confidentiality of U.S. information, the FTC and DOJ should periodically file reports with Congress.[30] Such reports should include such matters as: the number of bilateral agreements in force; whether foreign nations have enacted comparable legislation; the annual number of requests for cooperation or disclosure made by DOJ, FTC, and foreign agencies; the annual number of instances of actual cooperation or disclosure by DOJ, the FTC, and foreign agencies; whether information obtained under the IAEAA has facilitated antitrust enforcement by the U.S. and foreign agencies; and an evaluation of the effectiveness of confidentiality commitments of foreign signatories. These reports also should be available to the public.

Conclusion

In sum, the IAEAA is a solid, if modest, step in the direction of desirable global cooperation in competition issues, which has ever increasing significance in an economically interdependent world. If genuine reciprocity can be achieved, the IAEAA can promote both the efficiency and legitimate reach of U.S. antitrust enforcement. While the Task Force has identified important concerns, particularly with respect to confidentiality, it believes they can be resolved as proposed by the Task Force. The Task Force believes this measure should be supported by the Section, with modifications as indicated.

Senator METZENBAUM. Mr. Weinstein, we are very happy to have you with us today. You have been with us on previous occasions. We enjoy working with you and please proceed forward on behalf of Viacom.

STATEMENT OF MARK WEINSTEIN

Mr. WEINSTEIN. Thank you, Senator Metzenbaum and Senator Thurmond. I welcome this opportunity to appear——

Senator METZENBAUM. Want to bring the mike a little closer.

Mr. WEINSTEIN. Surely. I welcome this opportunity to appear before you today to testify on behalf of Viacom Inc. in support of S. 2297, the International Antitrust Enforcement Assistance Act of 1994. As an executive of Viacom Inc., a diversified entertainment and communications company with operations throughout the world, I am well aware of the necessity of enacting such legislation. If companies such as Viacom are to compete, and compete effectively, in our increasingly global economy, our government must have the tools it needs to enforce our antitrust laws. This legislation provides those tools while safeguarding against the unwarranted disclosure of sensitive business information.

Senator Metzenbaum, Senator Thurmond, Viacom supports this legislation because it will level the playing field for companies such as Viacom which increasingly compete in international markets. As you well know, the entertainment and telecommunication indus-

[30] The Task Force recommends that the first report be filed four years after the effective date of the IAEAA and thereafter every four years. As introduced, the IAEAA provides for a single report four years after enactment.

tries no longer operate within national boundaries. Foreign penetration of our country's entertainment market is on the rise as well as is our participation in international markets. This legislation, which will improve the U.S. government's ability to obtain foreign-located evidence of violations of U.S. antitrust law, is essential to our continued ability to compete fairly in this increasingly global economy.

Without this legislation, Viacom, and I believe all American firms with international operations, operate today at a competitive disadvantage within this global marketplace. Foreign-based monopolies and cartels can raise prices, hurt American businesses, and undermine American free markets without fear that our government will have either the power or the means to investigate effectively or deter such activity. As a result, American-based companies and, importantly, American consumers, have been forced to pay the price of allowing foreign firms to undermine our open markets unfettered by the reach of our antitrust laws.

This legislation, however, will give the Justice Department and the FTC the important new tools they will need to uncover anticompetitive behavior in international markets and within our own market that now escapes detection or punishment merely because the crucial evidence is located overseas. Foreign firms no longer will be able to hide behind international borders to prevent the production of documents essential to building a case against companies who would violate our own or foreign antitrust laws.

Viacom attaches particular importance to the role of this legislation in improving the ability of the U.S. antitrust agencies to cooperate in a meaningful way with their counterparts in the European Union. The member States of the EU have a combined population of 350 million. Europe obviously is an important market for us, and as the telecommunications revolution progresses, our ability to compete there on fair terms will become crucial to our viability as a player in the world market.

There are two reasons why improved antitrust cooperation between the U.S. and the EU is highly desirable from our point of view. First, if Viacom is the victim of anticompetitive practices in Europe by its rivals, we want the Justice Department and the Federal Trade Commission to be able to do something about it, either themselves or by working with the EU antitrust authorities. This bill will make the threat of direct U.S. action much more credible by enhancing our government's ability to obtain the foreign-located evidence it needs to bring such cases.

Second, as the recently reported cooperative effort of Justice and the EU in the Microsoft case shows, such cooperation often will enhance the likelihood of consistent antitrust enforcement results. I obviously cannot speak for Microsoft, but if Viacom were faced with a complex antitrust investigation, we would not want to be told to take one type of action by a U.S. agency and an inconsistent action by an EU agency, simply because the two agencies could not have meaningful conversations with one another. In an increasingly interdependent world market, dual antitrust investigations will occur more frequently. This bill goes a long way toward preventing inconsistent results.

Viacom shares the concerns of other American businesses that confidential business information obtained from our files will not be misused or improperly disclosed. Our review of the statute, including the numerous safeguards that have been incorporated into the statute, mitigates our concerns that anyone may have that sensitive commercial information may be improperly disclosed.

Viacom is particularly reassured by the requirement that before entering into any reciprocal agreement, Department of Justice or the Federal Trade Commission will have to be satisfied that the foreign antitrust authority can and will meet stringent confidentiality requirements for the information provided, including the fundamental requirement that the information be used only for antitrust enforcement.

Moreover, we are heartened that in the event of a breach of confidentiality, the entity providing such information will have to be notified, and the mutual assistance agreement terminated unless adequate steps are taken to minimize the harm from the breach.

Mr. Chairman, Viacom believes this legislation is well considered, well crafted, and extremely desirable. I appreciate this opportunity to express our support for this legislation. Thank you.

Senator METZENBAUM. Thank you very much, Mr. Weinstein.

And now our last witness, Mr. Richard Rogers.

STATEMENT OF RICHARD B. ROGERS

Mr. ROGERS. Mr. Chairman, my thanks to you and other members of this subcommittee for offering us the opportunity to testify today. I am employed by Ford Motor Company in Dearborn, MI, as one of their antitrust lawyers. However, I am appearing today on behalf of the National Association of Manufacturers, which, as you know, is a large voluntary organization consisting of approximately 12,000 manufacturing and related businesses.

On behalf of NAM, I would like to thank you for giving this opportunity to talk about Senate bill 2297. We have provided the subcommittee with a written statement, and I do not intend to substantially repeat it in my oral presentation. Suffice it to state that NAM thinks that the goal of improving antitrust enforcement on an international basis is a laudable goal. It must be remembered that many of our members are some of the largest purchasers and sellers in the world. So that a well defined, well enforced antitrust regime should be of benefit to us.

At the sametime, while we support that general goal, we do have some serious concerns about the fact that confidential information which is now provided with an utter assurance of confidentiality to both the Department of Justice and the FTC may be compromised to our competitors overseas. For that reason, we have suggested a number of amendments which are contained in the written statement.

By far the most important of those is an opportunity to receive notice when the Attorney General decides to disclose information to a foreign government and have a limited judicial review of that decision by the Attorney General. We have also suggested in conjunction with a number of other groups, including, I think, the American Bar Association, that the rights of those who have

waived their Fifth Amendment rights to obtain immunity here not be jeopardized by criminal proceedings abroad.

Finally, we have suggested that discovery under this law be conducted under our own rules of federal and criminal civil procedure which are the most expansive, we believe, in the world rather than foreign discovery procedures with which U.S. lawyers and U.S. judges are perhaps unfamiliar.

Lastly, we believe the law should be administered in such a way that providing information at the behest of a foreign antitrust authority should at least be consistent with our own principles of antitrust law here. Some antitrust laws have rules which are quite different and would be viewed as anticompetitive here.

I have been asked today to address a couple of practical business issues. One of them is the quality of information that we provide to our antitrust authorities in the United States. It is not at all unusual for the Federal Trade Commission and the Department of Justice to ask our member companies for future product plans, trade secrets, confidential technology, marketing strategies, pricing strategies, in short information that is quite valuable, quite sensitive, and goes to the heart of the competitive process.

We are aware of no other agency in the United States or abroad that routinely receives that sort of confidential information, and it is for that reason that we are requesting a limited review if that sort of information is to be turned over to a foreign authority.

A second issue: This bill has been vastly improved, I think on behalf of the entire business community, by the exemption of the massive amounts of material that are turned over to the government during the course of the Hart-Scott-Rodino premerger notification process and second request thereunder. That is an enormous help to the legislation. However, it has to be recognized that there is an ongoing relationship between the antitrust authorities on the one hand and U.S. business on the other whereby huge amounts of information are disclosed on a totally voluntary basis from day to day, sometimes pursuant to CID, sometimes simply a phone call or a request for a phone, telephone interview with people in a company who are knowledgeable about the products of the geographic markets involved, to assist the government's people in understanding what the conduct is, what the markets are, and whether or not it would be violative of U.S. law.

That is an enormously valuable process to the government, and, as I say, it is done now routinely and on a strictly voluntary basis. There is no real reason at this point for Ford or any other company to worry about that. It very often relates to investigations in which our company is not a target. It may relate to a merger of our suppliers. It may relate to a price-fixing conspiracy where one of our members is a victim. In any event, we can cooperate with those investigations absolutely secure in the knowledge that the information provided will remain confidential.

If this law is enacted without any provision for judicial review, there may be a chilling of that process, at least to the extent the lawyers involved in administering it will have to think: Is this the type of information that would be turned over to a foreign government and might in our judgment be compromised despite the best

efforts of our own antitrust people to assure that that does not happen.

If the legislation is enacted, and I think it will be, there will be a real disincentive for this sort of voluntary cooperation if leaks do, in fact, occur overseas and valuable competitive materials find their way into the hands of our foreign competitors. For that reason, NAM joined by the U.S. Chamber of Commerce and the U.S. Council for International Business have asked the subcommittee to consider amendments that would require a limited judicial review of an intent by the Attorney General to disclose specific information to a foreign government. That completes my presentation. I would be happy to answer any questions you might have.

Senator METZENBAUM. We will have some, Mr. Rogers, but I think we will start off with Mr. Rill.

[The prepared statements of the National Association of Manufacturers and the U.S. Council for International Business follow:]

PREPARED STATEMENT OF RICHARD ROGERS ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

EXECUTIVE SUMMARY

In this testimony, Richard Rogers, chairman of the National Association of Manufacturers (NAM) Competition Subcommittee, states that the NAM does not oppose enactment of S. 2279, the International Antitrust Enforcement Act. The association has several concerns about the legislation as introduced, however, and expresses its hope that these are addressed prior to final consideration. Specifically, the NAM believes that protections for confidential business documents need to be strengthened through judicial review of a Department of Justice decision to assist a foreign antitrust authority by disclosing confidential business information obtained from U.S. companies. Furthermore, the impact on rights and privileges under the U.S. Constitution need to be explored in the context of foreign investigations. Discovery procedures conducted at the behest of foreign antitrust authorities should be pursuant to federal rules, and not foreign procedures. Such discovery should not be conducted at all unless the foreign investigation relates to conduct violative of U.S. antitrust laws. Finally, the NAM suggests that the bill should be clarified in its treatment of U.S. laws that may conflict with foreign laws and in its definition of foreign antitrust laws "similar" to those of the United States.

Mr. Chairman, members of the subcommittee, my name is Richard Rogers and I am before you today to represent the views of the National Association of Manufacturers (NAM) regarding S. 2297, the International Antitrust Enforcement Act of 1994. I serve as chairman of the NAM's Competition Subcommittee, which is the policy-making arm of the NAM for antitrust issues. I am employed by Ford Motor Company as a lawyer specializing in antitrust matters.

The NAM is a voluntary business association of more than 12,000 companies, large and small, located in every state. Members range in size from the very large to more than 8,000 smaller manufacturing firms, each with fewer than 500 employees. The NAM is affiliated with an additional 158,000 businesses through its Associations Council and the National Industrial Council. NAM member companies employ 85 percent of all manufacturing workers and produce more than 80 percent of the nation's manufactured goods. One of the nation's oldest employer associations, the NAM will celebrate its centennial anniversary in 1995.

Let me begin by thanking the Subcommittee on Antitrust, Monopolies and Business Rights for the opportunity to testify. The proposed legislation, while laudable in its goal of improving international antitrust enforcement, creates some serious risks for U.S.-based companies competing against competitors located abroad. Many of our members do substantial business overseas, and some of the largest multinational business organizations in the world—with substantial foreign operations—belong to the NAM. The NAM has a great deal of collective experience about how the antitrust laws are enforced, both in the United States and in various foreign countries. In addition, many of our smaller members could be affected by S. 2297 because of the increasingly global nature of the marketplace.

Based on our members' experience in antitrust-related matters both here and abroad, the NAM shares the Justice Department's belief that improved international antitrust enforcement has the potential to benefit U.S. business. American businesses, which purchase and sell enormous quantities of goods abroad, have most probably been victims of foreign cartels in such areas as having to pay above-market prices or in being excluded from certain overseas markets. We also understand that antitrust violations committed abroad are often difficult or impossible to prosecute because of the limitations of U.S. discovery procedures as applied to foreign nationals and companies.

Thus, although NAM members have concerns about the proposed legislation as a solution, there is a consensus that the association should not actively oppose the proposal at this time. The NAM appreciates that significant changes were made from the draft that was originally circulated—the most important being the exclusion of Hart-Scott-Rodino filings. Nevertheless, important issues remain that Congress needs to address before final consideration of S. 2297, including how to ensure that U.S. constitutional rights and privileges are met while dealing with foreign antitrust enforcement agencies. The NAM hopes that you and the Department of Justice will consider these comments as constructive criticism and that the committee will make appropriate changes to the legislative language.

On its face, the solution proposed by the International Antitrust Enforcement Act of 1994 is necessarily backward—dealing with foreign cartels by subjecting U.S. firms to discovery at the request of foreign governments investigating violations of foreign antitrust laws. The Department of Justice contends that offering up U.S. firms for discovery related to prosecution under foreign laws will thereby encourage foreign governments to offer up their own nationals and businesses for prosecution in the United States. It is by no means certain or obvious, however, that offering up domestic firms for foreign investigation and prosecution (under "antitrust laws" abroad which are sometimes in conflict with our own) will have any reciprocal effect at all. Moreover, the "currency" being offered to encourage reciprocity by foreign antitrust enforcement authorities are often confidential business documents of U.S. companies. Thus, the proposed legislation is a risk—calculated though it may be—falling squarely on the shoulders of American business, by placing confidential documents in potential jeopardy of disclosure to foreign competitors. In many instances, these competitors have a relationship with foreign governments much closer than exists between business and government in the United States. Indeed, in some cases the competitor and government may be one and the same.

To minimize the risks involved for U.S. business, S. 2297 should, first and foremost, affirmatively provide for (rather than expressly negate) the opportunity for judicial review of the attorney general's decision to turn confidential and proprietary business information collected from U.S. firms over to foreign antitrust enforcement authorities. The NAM urges Congress to grant as much protection as possible for this information, which can be highly sensitive in antitrust investigations. These investigations often include requests for documents such as future product plans, new technologies and marketing strategies. Specifically, the NAM suggests eliminating the bar to judicial review contained in Section 9(a). Instead, the attorney general should be required to give reasonable notice of an intent to disclose evidence to foreign antitrust officials. Such advance notice would describe the antitrust evidence to be disclosed, identify the foreign antitrust authority, and give the proposed date of disclosure.

Thereafter, the affected U.S. companies should be allowed to object promptly in writing to the proposed disclosure. After receiving the written objection, the attorney general then would be required to apply to the district court in which the objector resides prior to sharing the materials in question. Before releasing the information, that court would then be asked to find that: (1) the proposed disclosure does not violate the terms of the proposed International Antitrust Enforcement Act, and (2) the interests of the United States in disclosing antitrust evidence outweigh the confidentiality concerns of the affected U.S. firm, taking into account such factors as the risk of unauthorized disclosure by the foreign antitrust authority, the relevance of the evidence to the foreign antitrust violation alleged, the extent to which such foreign laws may differ or conflict with U.S. antitrust policy, and whether the foreign state has a proprietary interest that could benefit from disclosure of the confidential information sought from the affected businesses.

Some form of judicial review apparently is contemplated under the proposed legislation for the collection of new evidence from U.S. companies, for which the attorney general is required to apply to the district courts for an order authorizing discovery at the behest of the foreign antitrust authority. Information collected by U.S. antitrust agencies in all other contexts (save information provided pursuant to the Hart-Scott-Rodino Act premerger notification process or specified grand jury materials),

however, is subject to no judicial review at all. Antitrust evidence collected by U.S. authorities for purposes other than at the request of foreign governments should be entitled to at least the same judicial protections afforded when new antitrust evidence is sought at the request of a foreign government.

S. 2297 also provides that discovery ordered by U.S. district courts at the request of foreign antitrust authorities "may be in whole or in part the practice and procedure of the foreign state, or the regional economic integration organization, represented by the foreign antitrust authority with respect to which the [a]ttorney [g]eneral requests such order." Section 4(b)(2). U.S. discovery procedures are the most generous and sophisticated in the world, providing for the taking of testimony under oath, requests for documents of sometimes enormous scope, and information provided in response to written questions. These procedures are well known to U.S. government lawyers, the private bar and the federal judicial system. In contrast, neither the courts, nor the government, nor the private bar are expert in foreign discovery procedures and the imposition of those procedures on antitrust discovery here can only lead to confusion, as well as unnecessary confrontation and complexity. All discovery under the International Antitrust Enforcement Act should be conducted pursuant to U.S. discovery rules and procedures.

Similarly, a major constitutional issue arises for when a potential defendant waives his or her Fifth Amendment rights in exchange for immunity from U.S. prosecution. The person's statements or testimony, however, may then become the basis for prosecution by foreign authorities. At a minimum, United States residents who have waived their constitutional rights in order to assist the Department of Justice in a prosecution should be protected from having the Department then aid a foreign antitrust authority in its investigation and/or prosecution of the individual.

In order to allay confusion, the International Antitrust Enforcement Act should also expressly provide that foreign antitrust laws sought to be enforced under mutual agreements are consistent with U.S. antitrust laws. For example, many mergers and acquisitions are premised, from both a business and antitrust law viewpoint, on the realization of economic efficiencies that result from elimination of duplicate or inefficient production facilities. Foreign laws prohibiting or inhibiting plant closings should not be enforced through the back door under the proposed legislation, to the detriment of economic efficiencies that would be viewed as pro-competitive under U.S. law.

Some foreign antitrust enforcement authorities also prohibit or frown on beneficial exchanges or publication of information generally recognized to enhance the competitiveness of U.S. business. For instance, "benchmarking" of the best competitive practices is commonplace here, and has resulted in substantial increases in the productivity of U.S. business. Production and sales data are also reported by trade associations or in various media, and permit U.S. firms to more accurately assess supply and demand for their products in various geographic markets. It would be a real economic step backward for the U.S. economy if exchanges of information and ideas that are recognized as both lawful and beneficial here were to be subjected to attack abroad with the active assistance of U.S. antitrust enforcement personnel.

The NAM is particularly concerned that the International Antitrust Enforcement Act authorizes U.S. officials to assist foreign authorities in investigating conduct that does not violate U.S. law. In fact, this license is in conflict with the spirit if not the letter of several United States statutes, including the Export Trading Company Act, the Webb-Pomerene Act, the Foreign Trade Antitrust Improvements Act, as well as the National Cooperative Production Amendments of 1993 and the National Cooperative Research Act. The Export Trading Company Act and the Webb-Pomerene Act exempt companies from U.S. antitrust laws in the course of making agreements regarding exports. The Foreign Trade Antitrust Improvements Act likewise exempt domestic companies from U.S. antitrust laws with respect to exports that do no have a substantial impact on the domestic economy. Finally, the National Cooperative Production Amendments of 1993 and the National Cooperative Research Act limit exposure in private antitrust lawsuits to actual damages so long as U.S. antitrust authorities have approved the joint research and/or production venture as consistent with domestic antitrust laws. Various federal agencies are involved in the administration of these statutes, the enforcement and procedures of which involve highly sensitive proprietary data. A provision should be added to clarify that information involved in agreements authorized under S. 2297 excludes the administration of these and any other statutes that may conflict with foreign antitrust laws.

Finally, Section 12(7) needs to clarify what types of foreign laws, regulations or conduct are "similar" to the antitrust laws of the United States. For instance, "unfair competition" may be incorporated in the laws of many countries and integrated

economic markets, but definitions and interpretations of the term could vary widely depending on the history and culture of the entity.

These comments notwithstanding, I would like to reiterate that the NAM is not disposed to oppose the proposal at this juncture. Our membership hopes, however, that the concerns are dealt with and that S. 2297 is amended to provide better assurance that any resulting exchanges of business information between U.S. and foreign antitrust enforcement authorities do not compromise the confidentiality protections afforded by current U.S. laws nor undermine protections provided to U.S. residents under the Constitution.

I appreciate the opportunity to offer these comments on behalf of the NAM. I look forward to answering any questions you may have.

PREPARED STATEMENT OF THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

The U.S. Council for International Business supports the aim of S. 2279, the International Antitrust Enforcement Assistance Act of 1994 ("IAEAA "), to encourage and facilitate multilateral and bilateral cooperation in the investigation and enforcement of antitrust laws. We are, however, concerned about the lack of adequate safeguards in the legislation for the protection of trade secrets and other confidential and proprietary information. Since the absence of such safeguards could do serious harm not only to individual companies, but also to the competitiveness of American business generally, we are proposing an amendment to the bill to address this concern.

The proposed legislation would authorize the Attorney General and the Federal Trade Commission to provide evidence to a foreign antitrust authority under a mutual assistance agreement. IAEAA § 2. As we know from antitrust investigations within the United States, this evidence frequently includes sensitive pricing data, new product and cost information, competitive analyses, strategic plans, trade secrets, and other confidential and proprietary information that must not be disclosed to competitors. For this reason, the Antitrust Civil Process Act and the Federal Trade Commission Act provide well-established procedures to prevent improper disclosures of information obtained by the Attorney General and the Federal Trade Commission during an antitrust investigation.

The Antitrust Civil Process Act and the FTC Act provide that a custodian must be appointed who shall be responsible for maintaining confidential information and ensuring its return to the company that provided it upon completion of the investigation. *See* 15 U.S.C. § 1313; 15 U.S.C. § 57b-2. These statutes provide that no documents or other evidence may be disclosed to any individual other than an authorized official, employee or agent of the Department of Justice, or in the case of materials maintained by the Federal Trade Commission, an authorized officer or employee of the FTC, without the consent of the company that provided the materials. *See* 15 U.S.C. § 1313 (c)(3); 15 U.S.C. § 57b-2(c). While the statutes provide that disclosures may be made to either House of Congress, or to a committee or subcommittee of the Congress, the owner or provider must be notified of such disclosures. *See* 15 U.S.C. § 1313 (c)(3); 15 U.S.C. § 57b-2(c).

In contrast to the restrictions imposed on the Attorney General and Federal Trade Commission with respect to disclosures of confidential information to the Congress and authorized employees of the U.S. Government, the IAEAA would permit the sensitive commercial information to be turned over to a foreign agency without notice to the company that owns or provided the information.

It is true that, under the IAEAA, the U.S. antitrust authority involved would be required to obtain an "assurance" from the foreign agency that it is subject to laws and procedures adequate to maintain the confidentiality of the information and will afford it a level of protection not less than what is provided by U.S. law (IAEAA § 12(2)(B)). However, the person whose information is being shared would have no say in the entire process. Indeed, a company that provided confidential information to the Attorney General or the FTC would be notified of its release to a foreign agency only in the event the foreign agency violated its "assurance" of confidentiality, and then only after the violation had occurred. IAEAA § 12(2)(G). Moreover, the Attorney General's determination that the foreign agency's "assurance'" was adequate would not be subject to judicial review. IAEAA § 9(a).

The disclosure of sensitive commercial information to a foreign agency without notice and an opportunity to be heard raises serious concerns. As an initial matter, the foreign agencies that would receive confidential information may have very different concepts of "confidentiality" than we have in the United States. For example, under the Treaty of Rome, information that is provided to the European Community

must be disclosed to all member states. Moreover, the nations and regional economic organizations that have adopted antitrust laws that are arguably "similar" to the United States—and with which the confidential information of U.S. companies may therefore be shared—include not only our traditional allies and trading partners, but also many developing nations and former communist states such as Bulgaria, the Czech and Slovak Republics, Hungary, India, Pakistan, Peru, Poland, Russia, Sri Lanka, Venezuela and Zimbabwe. Many other states, such as Croatia, the Philippines and Rumania, are in the process of adopting their own antitrust laws.

Once the information is released to an agency in one of these countries, it will be impossible to keep track of who has had access to it. This is particularly true if, as the present IAEAA provides, the company is not even informed that its information has passed into foreign hands. If one also considers that many countries that now have (or may soon adopt) antitrust laws have strong policies in favor of improving the competitiveness of their own national industries, including their competitiveness vis-a-vis U.S. companies as well as the fact that some of these countries may have bureaucracies that are not totally incorruptible—it is clear that the danger that U.S. trade secrets may be lost is not merely a theoretical one.

Disclosure of sensitive commercial information without notice to the company that provided the information also raises the prospect that the Attorney General or the Federal Trade Commission may release information which they might not have released if they had the benefit of the company's views. In many fields, particularly very technical areas where trade secrets and proprietary information are most important, input from the company that provided the information may be essential to fully understand the implications of revealing certain data to a competitor.

We recognize that extensive notification and judicial review procedures would defeat the purpose of the IAEAA to facilitate the exchange of information between enforcement agencies in the United States and elsewhere in the world. Accordingly, we propose only an amendment of the IAEAA to provide notice to the company whose information will be released, a very short time frame to object to that release, and an expedited judicial review procedure that would override a decision by the Attorney General or the FTC only in the case of an abuse of discretion. The following is proposed language for this amendment:

SEC. X NOTICE OF DISCLOSURE TO A FOREIGN ANTITRUST AUTHORITY

(a) *Notice Required*—Not less than 45 days before disclosing antitrust evidence to a foreign antitrust authority under Section 2, 3, or 4, the Attorney General or the Commission, as the case may be, shall provide notice to the person (if any) that provided such evidence to the Attorney General or the Commission. Such notice shall be given by overnight mail or equivalent means and shall include:

(1) a description sufficient to permit identification of the antitrust evidence to be disclosed;
(2) the identity of the foreign antitrust authority, and
(3) the proposed date of disclosure.

(b) *Objections*—If the person to whom the notice in subsection (a) is provided objects in writing to the Attorney General or the Commission, whichever provided the notice, within 15 days of receiving such notice, no disclosure under this Act shall be made unless, at least 15 days prior to the disclosure of such evidence, the Attorney General or the Commission makes a written decision rejecting the objection, indicating the grounds therefor, and finding that (i) the information may be disclosed under the Act, and (ii) the foreign antitrust authority is subject to laws and procedures that are adequate to maintain the confidentiality of antitrust evidence and will give protection to the antitrust evidence that is not less than the protection provided under the laws of the United States to such antitrust evidence.

(c) *Judicial Relief*—Any persons who believe they are adversely affected by such a decision may bring a judicial proceeding for a preliminary injunction or temporary restraining order to enjoin disclosure of the information in question upon a showing that the aforesaid decision represents an abuse of discretion, and that the other legal requirements for obtaining such relief are satisfied.

We submit that this amendment will help to alleviate the legitimate concern that the confidential and sensitive commercial and proprietary information will be misused, while only minimally inconveniencing the antitrust agencies involved.

We recognize that the concerns we have raised with respect to the IAEAA are not unique to this bill, but may apply as well to certain other vehicles for cooperation among law enforcement agencies. In this particular context, however, we believe that these concerns may be addressed without undermining the essential goals which the bill is intended to achieve.

Senator METZENBAUM. Mr. Rill, the ABA committee's report on the bill states, "There have been many instances in which U.S. antitrust investigations have faltered or even failed as a consequence of the inability of the DOJ or FTC to obtain evidence from abroad." Now based on your experience as an antitrust chief in the Bush administration, can you confirm the fact that international cases have been dropped because DOJ could not get evidence from abroad?

Mr. RILL. I would say that I would confirm that statement. I would say that we had not ever reached the point, and, of course, I cannot go into any detail as you can understand, but I would say that we never reached the point we had made a clear determination that there was a violation. We had every reason to believe in some circumstances that a violation had occurred, but we simply were not able under existing process, existing procedures, to obtain the evidence that would be necessary to justify the initiation of a complaint proceeding, and the reason that we were not is that the process for attempting to obtain overseas discovery is so cumbersome, so time consuming, and so uncertain in its result that it was not desirable or even in many instances possible to pursue the investigation to the final conclusion that would have justified the initiation of a proceeding.

So I would say in confirming what Assistant Attorney General Bingaman said earlier that my experience is the same as hers.

Senator METZENBAUM. Well, I am pleased to see that both the Antitrust Division and the International Section of the ABA support the bill. I am sure you have noticed that the bill includes a number of safeguards recommended by these ABA committees. Despite the addition of these safeguards, Mr. Rogers has testified that there are not enough to protect confidential documents from being leaked to U.S. competitors. Do you agree with that statement and would you indicate why you do or why you do not agree?

Mr. RILL. Well, I have the utmost respect for Mr. Rogers. He and I have worked together over a number of years, and he is certainly an eminent antitrust authority. Having said that——[Laughter.]

I think the provisions in this bill really are fully adequate within any range of reasonableness adequately to assure businesses and others who would be turning documents over to our antitrust agencies that their subsequent transfer to a responsible foreign antitrust agency will be safeguarded as appropriate under the terms of confidentiality assurances.

The bill sets out certain predicate standards for the enforcement agencies to follow when they enter into an agreement which include confidentiality safeguards. The legislation requires that prior to the transfer of any material that is confidential under the agreement, that a further determination be made that the recipient foreign agency will safeguard the confidentiality of the material.

The agreements themselves are subject to notice and comment from outside parties to assure that the provisions of any agreement relating to confidentiality and other factors are thoroughly aired, and not inconsiderable force of detailed congressional oversight is also incorporated in the bill, and I am confident that anyone who feels that confidentiality safeguards have not been fully honored

will not be reluctant to bring that to the attention of this committee.

The additional safeguard in that context that I think is being proffered by Mr. Rogers is one that I think while certainly well thought through would not be necessary and moreover could severely inhibit the ability of the United States and their foreign counterparts effectively to enforce antitrust principles in a global context. I say that because to have notice and judicial review essentially anytime a confidential document is to be turned over would necessitate a concept that the Assistant Attorney General, for example, had not adequately undertaken to review the need, the public policy, and the confidentiality assurances being given by the foreign government to whom the document is to be provided, had not adequately done her job.

And then I think when the court reviews that particular situation, that particular determination, the court is going to say, well, here is the legislative standard, here is the work that was done by the Assistant Attorney General to assure that confidentiality safeguards will be protected. Am I as the court in the abstract going to say that that determination was not properly made? I do not think so. I mean some judge somewhere might, but I do not think most judges would overrule the determination of the Assistant Attorney General. So I do not think that safeguard in reality is a meaningful safeguard. Conversely, it will take time to go through the process of notice and judicial review that could compromise the investigation and further it could disclose, I think with some danger to the efficacy of the investigation, the investigatory theories and approach of both the U.S. and the foreign agency. So I respectfully would say that I do not think Mr. Rogers' proposal would advance the purposes of the legislation or be necessary or desirable to assure confidentiality.

Senator METZENBAUM. Thank you very much, Mr. Rill. Mr. Weinstein, I know a lot about your company. I learned a lot earlier this year, particularly your fight with QVC to buy Paramount. Without a doubt, you represent an aggressive competitor, well-respected company, that is in the forefront of the communication industry in the U.S. and abroad. Anne Bingaman testified that our information exchange bill will create a level playing field for companies like your company which compete in foreign markets. Do you agree with that characterization of the bill, and if so, how would the bill help Viacom compete in foreign markets?

Mr. WEINSTEIN. Well, thank you, Senator. Thank you for those kind words. But we are an aggressive competitor, and we believe that competition should be fair. And we believe that appropriate antitrust or anticompetitive laws should be enforced in all jurisdictions around the world. We see the bill as helping that happen. If you go back many years, somebody once said when I was a young lawyer that it is the private lawyers who basically enforce the antitrust laws of the world because they advise clients not to do things that are anticompetitive.

I think over time that has been probably less so because the lawyers cannot tell their clients that the laws will ever be enforced to any practical effect. I think this bill is a first and a major step in our global economy as opposed to just an economy by national

boundaries of making those laws enforceable and therefore giving a level playing field for companies such as mine to compete in a global marketplace.

Senator METZENBAUM. Are you satisfied that there are safeguards in the bill against improper disclosure of top confidential documents and would you not agree that U.S. companies can have a high degree of confidence in the ability of our antitrust agencies to safeguard the confidentiality of any antitrust evidence that they share with foreign authorities?

Mr. WEINSTEIN. I would, and I certainly feel much better after hearing Mr. Rill relate the provisions of the bill. But having looked at the bill, and I am highly confident, I think we have lived in this country certainly with a sense of confidentiality when we disclose information to our governmental authorities, I think that the Department of Justice and the Antitrust Division will effectively help us in that regard in drafting agreements overseas as Mr. Rill as indicated. So we are comfortable with the confidentiality provisions of the proposed legislation.

Senator METZENBAUM. Thank you very much, Mr. Weinstein. Mr. Rogers, I want to be clear as to the position of Ford and NAM on this bill. I know that you have indicated that there ought to be a certain number of amendments, but my question is if the amendments are not contained in the bill, is the NAM and Ford Motor Company opposed to the bill?

Mr. ROGERS. No, Senator. We think the bill could be improved vastly by the amendments but we would not oppose it unamended.

Senator METZENBAUM. I appreciate that clarification. In your statement, you acknowledge that American businesses which sell abroad have most probably been victims of foreign cartels. The head of SEC's International Division testified that having this ability to exchange evidence with foreign authorities gives the agency access to evidence kept outside the USA. He also said that exchanged evidence has made it possible for the SEC to bring more cases in court.

Anne Bingaman has testified that having exchange authority will make it possible for the division to get evidence kept abroad that is currently beyond its reach. She also mentioned two recent price-fixing cases that the division could not have won without evidence that it got from abroad under an agreement with Canada that is currently limited to criminal matters. Would you not agree that based on the SEC's experience, U.S. companies will benefit if we give the Antitrust Division wider authority to get incriminating evidence on cartels from these foreign counterparts?

Mr. ROGERS. If we did not believe that, we would actively oppose the bill because obviously there would be no benefit for U.S. business if we did not think there would be a positive effect. I guess the difference here is one of degree, and it stems from the fact that representing companies directly as I do, what we are talking about here is the disclosure of our documents so our interest is somewhat more direct. Also people like me have to deal with managements who are asked, who ask their lawyers what will happen to very confidential documents, and at this time we can advise them that confidentiality is virtually absolute.

Now we have to change our advice somewhat. And if there are instances under this law if enacted where the confidentiality is abused, we have to advise them of that fact, too. I would not want to see a lot of very positive from both business and government point of view voluntary cooperation jeopardized in any way, and that is why we are suggesting the amendments that we are.

Senator METZENBAUM. Thank you, Mr. Rogers. Senator Thurmond.

Senator THURMOND. Thank you. Mr. Rill, glad to see you again. You did a fine job when you were here before.

Mr. RILL. Thank you, sir.

Senator THURMOND. I want to commend you for your efforts in thoroughly analyzing and encouraging this legislation. My question is would you have liked to have had this legislation in place when you were the Assistant Attorney General for the Antitrust Division? And what difference, if any, would it have made?

Mr. RILL. Absolutely I would have liked to have had this legislation in place. I think it would have given the tools to us to obtain agreements with our foreign counterparts who have responsible antitrust agencies whereby we could have been a great deal more effective in international antitrust enforcement to attack global cartel practices that were very difficult to uncover, very difficult to attack, under the current restrictions in our ability to cooperate. I think it would have made a world of difference if we had had the tools to enter into those kinds of agreements.

Senator THURMOND. Mr. Rill, do you think that this legislation will lead to more consistent enforcement actions against antitrust violations in more than one country, and do you think such a result is desirable?

Mr. RILL. Actually, Senator, that is an excellent question, and, yes, I do think it will lead to more consistent results because I think it is a stepping stone on the way to greater convergence of antitrust enforcement policy and procedure, and I think as we are able to cooperate more closely with our foreign counterparts, I think that the level of antitrust analysis, the quality of antitrust analysis and the quality of antitrust enforcement would be significantly improved, and I think this legislation is a positive step in that direction.

Senator THURMOND. Mr. Weinstein, if this legislation is enacted and works the way it is intended to, could you give us your views on how Viacom might be benefited?

Mr. WEINSTEIN. Well, I think that activities that occur around the world, what this bill does is gives the Department of Justice or the Federal Trade Commission an opportunity to investigate them under the United States antitrust laws because many, quite often—I defer to Mr. Rill or Mr. Rogers, Mr. Silberman, as experts in the antitrust laws—quite often violations of our laws occur outside the United States or evidence of the violation of our laws is located outside the United States, and we think that by having an ability to seek information overseas and with other governments, that it will enhance the enforcement of our laws, and that we believe is a very positive event.

Senator THURMOND. Mr. Rogers, your written statement asserts that disclosing information from U.S. companies pursuant to this

legislation might not have any reciprocal effect. Could you please explain your statement in light of the fact that the legislation only permits American authorities to provide information if there is reciprocity from the foreign country that is comparable in scope?

Mr. ROGERS. It is probable that you will get some additional cooperation, Senator. I did not mean to rule out that possibility. All I said was that strictly speaking, this law can by its very nature only affect the information which is made available to U.S. companies or by U.S. companies to federal authorities.

Senator THURMOND. Speak louder. I cannot hear you.

Mr. ROGERS. I am sorry. The legislation necessarily assumes that foreign governments will cooperate if we make our own companies' information subject to disclosure abroad, but the bill of necessity does not require any foreign country to do anything. So in that sense, it is not a self-operating law. It encourages cooperation abroad. It does not guarantee it. And there will be some countries, I am sure, that will not take advantage of the law.

Senator THURMOND. Mr. Rogers, do you not see the need for this legislation to contain terms that would be acceptable to the United States if those terms are incorporated into the laws of foreign countries? For example, on your concern about authorizing the U.S. District courts to use foreign discovery procedures, do you see a benefit in that provision being included in the foreign law?

Mr. ROGERS. Yes, I do. As I understand the bill, if the government seeks new information at the behest of a foreign antitrust authority, they do have to go into a U.S. District court and ask for that information, at which point a company that thinks that it has reason to believe the information would not be secure can go in and ask the judge to either deny the request or to get a protective order.

What we are really suggesting is that should be applied to the vast quantities of information that the government collects in antitrust investigations routinely and then is kept in the possession of the government, and it is that about which we are concerned.

Mr. Rill indicated—and by the way, I like and respect Mr. Rill, and I have for years——

Mr. RILL. Having said that——

Mr. ROGERS. However, [laughter] he and I have been in this business a longtime, often representing defendants in actions brought by the Attorney General, and so he and I have both disagreed with the Attorney General before and sometimes have done so successfully, so I do not think it reflects adversely on the Attorney General's determination that a specific disclosure of specific information would not be, or you would have reason to think that that would jeopardize the confidentiality of the information.

I might add that I think that event would occur only very rarely where the information involved was considered to be truly highly confidential, and there was a real concern that it would not be kept confidential overseas. So I do not see this as being something that is an automatic objection to disclosure abroad. I think it would be used very rarely, but I think it would be a very valuable protection for American business to have it incorporated in the law.

Senator THURMOND. Mr. Rogers, what is your perspective on Mr. Weinstein's statement that this legislation is needed because Amer-

ican firms with international operations operate at a competitive disadvantage in the global marketplace?

Mr. ROGERS. I think he is partially correct. I hope he is entirely correct. I do think there are markets, I know of markets where our entry is either impossible or quite difficult. Sometimes it is impossible because the sovereigns simply will not let us in. It does not have to do with illegal cartels. It is a matter of overseas government policy, and obviously we cannot do anything about that under the antitrust laws. But I believe his statement is correct and that a law that would encourage additional entry would be a positive one, and hopefully this law will work out that way. And that is why NAM does not oppose it.

Senator THURMOND. Mr. Silberman, as representing the American Bar Association, do you feel strongly that this legislation is in the best interest of this country and the public generally?

Mr. SILBERMAN. Yes, Senator, we certainly do. In particular, the American Bar Association Section of Antitrust Law believes that if you do not have strong international antitrust enforcement and if you do not empower our own Attorney General to work out agreements in the form of MOU's that we will all suffer because we will not have as good information for making antitrust decisions as we should have to make intelligent decisions in the public interest.

Senator THURMOND. I want to thank all of you gentlemen for your presence here today, and also thank Ms. Bingaman and Mr. Mann for their presence, too. Mr. Chairman, I have no more questions.

Senator METZENBAUM. Thank you very much, and I am about to conclude this hearing. Before doing so, I might say I have been in the Senate 19 years, and I do not have any previous recollection where the head of an agency testified and then sat around to hear the testimony of the other witnesses and we are very pleased that Ms. Bingaman saw fit to do so, and with that we stand adjourned.

[Whereupon, at 4:35 p.m., the subcommittee adjourned.]

APPENDIX

PROPOSED LEGISLATION

II

103D CONGRESS
2D SESSION

S. 2297

To facilitate obtaining foreign-located antitrust evidence by authorizing the Attorney General of the United States and the Federal Trade Commission to provide, in accordance with antitrust mutual assistance agreements, antitrust evidence to foreign antitrust authorities on a reciprocal basis; and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 19 (legislative day, JULY 11), 1994

Mr. METZENBAUM (for himself, Mr. THURMOND, Mr. KENNEDY, Mr. BIDEN, Mr. LEAHY, Mr. SIMON, Mr. SIMPSON, and Mr. GRASSLEY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To facilitate obtaining foreign-located antitrust evidence by authorizing the Attorney General of the United States and the Federal Trade Commission to provide, in accordance with antitrust mutual assistance agreements, antitrust evidence to foreign antitrust authorities on a reciprocal basis; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "International Antitrust Enforcement Assistance Act of 1994".

SEC. 2. DISCLOSURE TO A FOREIGN ANTITRUST AUTHORITY OF ANTITRUST EVIDENCE.

Subject to section 8 and except as provided in section 5, the Attorney General of the United States and the Federal Trade Commission may provide, in accordance with an antitrust mutual assistance agreement in effect with a foreign antitrust authority, antitrust evidence to the foreign antitrust authority to assist the foreign antitrust authority—

(1) to determine whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or

(2) to enforce any of such foreign antitrust laws.

SEC. 3. INVESTIGATIONS TO ASSIST A FOREIGN ANTITRUST AUTHORITY IN OBTAINING ANTITRUST EVIDENCE.

(a) GENERAL AUTHORITY.—In accordance with an antitrust mutual assistance agreement in effect with a foreign antitrust authority, subject to section 8, and except as provided in section 5, the Attorney General may, using the authority of the Attorney General to investigate possible violations of the Federal antitrust laws, conduct investigations to obtain antitrust evidence relating to a violation of the foreign antitrust laws administered or en-

forced by the foreign antitrust authority, and may provide such antitrust evidence to the foreign antitrust authority, to assist the foreign antitrust authority—

(1) to determine whether a person has violated or is about to violate any of such foreign antitrust laws, or

(2) to enforce any of such foreign antitrust laws.

Such investigations may be conducted, and such antitrust evidence may be provided, without regard to whether the conduct investigated violates any of the Federal antitrust laws.

(b) CONFORMING AMENDMENTS.—The Antitrust Civil Process Act (15 U.S.C. 1311 et seq) is amended—

(1) in section 2—

(A) in subsection (d)—

(i) by striking "or any" and inserting ", any", and

(ii) by inserting before the period ", or any of the foreign antitrust laws", and

(B) by adding at the end the following:

"(k) The term 'foreign antitrust laws' has the meaning given such term in section 12 of the International Antitrust Enforcement Assistance Act of 1994.", and

(2) in the first sentence of section 3(a)—

(A) by inserting "or to an investigation authorized by section 3(a) of the International Antitrust Enforcement Assistance Act of 1994" after "investigation", and

(B) by inserting "by the United States" after "proceeding".

SEC. 4. JURISDICTION OF THE DISTRICT COURTS OF THE UNITED STATES.

(a) AUTHORITY OF THE DISTRICT COURTS.—On the application of the Attorney General made in accordance with an antitrust mutual assistance agreement in effect with a foreign antitrust authority, the United States district court for the district in which a person resides, is found, or transacts business may order such person to give testimony or a statement, or to produce a document or other thing, to the Attorney General to assist the foreign antitrust authority that is a party to such agreement—

(1) to determine whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or

(2) to enforce any of such foreign antitrust laws.

(b) CONTENTS OF ORDER.—(1) An order issued under subsection (a) may direct that testimony or a state-

ment be given, or a document or other thing be produced, to a person who shall be recommended by the Attorney General and appointed by the court. A person so appointed shall have power to administer any necessary oath and to take such testimony or such statement.

(2) An order issued under subsection (a) may prescribe the practice and procedure for taking testimony and statements. Such practice and procedure may be in whole or in part the practice and procedure of the foreign state, or the regional economic integration organization, represented by the foreign antitrust authority with respect to which the Attorney General requests such order. To the extent such order does not prescribe otherwise, any testimony and statements required to be taken shall be taken, and any documents and other things required to be produced shall be produced, in accordance with the Federal Rules of Civil Procedure.

(c) RIGHTS AND PRIVILEGES PRESERVED.—A person may not be compelled under an order issued under subsection (a) to give testimony or a statement, or to produce a document or other thing, in violation of any legally applicable right or privilege.

(d) VOLUNTARY CONDUCT.—This section does not preclude a person in the United States from voluntarily giving testimony or a statement, or producing a document

or other thing, in any manner acceptable to such person for use in an investigation by a foreign antitrust authority.

SEC. 5. LIMITATIONS ON AUTHORITY.

Sections 2, 3, and 4 shall not apply with respect to the following antitrust evidence:

(1) Antitrust evidence that is received by the Attorney General or the Commission under section 7A of the Clayton Act (15 U.S.C. 18a), as added by title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. Nothing in this paragraph shall affect the ability of the Attorney General or the Commission to disclose to a foreign antitrust authority antitrust evidence that is obtained otherwise than under such section 7A.

(2) Antitrust evidence that is matter occurring before a grand jury and with respect to which disclosure is prevented by Federal law, except that for purposes of this section and Rule 6(e)(3)(e)(i) of the Federal Rules of Criminal Procedure, a judicial proceeding includes a judicial or administrative proceeding of a foreign state or a regional economic integration organization under any of the foreign antitrust laws of such foreign state or such organization.

(3) Antitrust evidence that is specifically authorized under criteria established by Executive

Order 12356, or any successor to such order, to be kept secret in the interest of national defense or foreign policy, and—

(A) that is classified pursuant to such order or such successor, or

(B) with respect to which a determination of classification is pending under such order or such successor.

(4) Antitrust evidence that is classified under section 142 of the Atomic Energy Act of 1954 (42 U.S.C. 2162).

SEC. 6. DISCLOSURE OF ANTITRUST EVIDENCE OBTAINED UNDER THE ANTITRUST CIVIL PROCESS ACT.

Section 4 of the Antitrust Civil Process Act (15 U.S.C. 1313) shall not apply to prevent the Attorney General from providing to a foreign antitrust authority antitrust evidence in accordance with an antitrust mutual assistance agreement in effect under this Act and in accordance with the other requirements of this Act.

SEC. 7. PUBLICATION REQUIREMENTS APPLICABLE TO ANTITRUST MUTUAL ASSISTANCE AGREEMENTS.

(a) PUBLICATION OF PROPOSED ANTITRUST MUTUAL ASSISTANCE AGREEMENTS.—Not less than 45 days before entering into an antitrust mutual assistance agree-

ment and after consultation with the Commission, the Attorney General shall publish in the Federal Register—

(1) the proposed text of such agreement and any modification to such proposed text, and

(2) a request for public comment with respect to such text or such modification, as the case may be.

(b) PUBLICATION OF PROPOSED AMENDMENTS TO ANTITRUST MUTUAL ASSISTANCE AGREEMENTS IN EFFECT.—Not less than 45 days before entering into an agreement that makes an amendment to an antitrust mutual assistance agreement in effect under this Act and after consultation with the Commission, the Attorney General shall publish in the Federal Register—

(1) the proposed text of such amendment, and

(2) a request for public comment with respect to such amendment.

(c) PUBLICATION OF ANTITRUST MUTUAL ASSISTANCE AGREEMENTS ENTERED INTO AND OF AMENDMENTS TO SUCH AGREEMENTS.—Not later than 30 days after entering into an antitrust mutual assistance agreement, or an agreement that makes an amendment to an antitrust mutual assistance agreement in effect under this Act, the Attorney General shall publish in the Federal Register—

(1) the text of the antitrust mutual assistance agreement or of such amendment, as the case may be, and

(2) in the case of an agreement that makes such amendment, a notice containing—

(A) a statement of the fact that such agreement was entered into,

(B) citations to the provisions of the Federal Register that contain the text of the amendment and of the antitrust mutual assistance agreement that is so amended, and

(C) a description of the manner in which a copy of the antitrust mutual assistance agreement, as so amended, may be obtained from the Attorney General.

(d) CONDITION FOR VALIDITY.—An antitrust mutual assistance agreement, or an agreement that makes an amendment to an antitrust mutual assistance agreement, entered into in violation of subsection (a) or (b) shall not be considered to be entered into under the authority of this Act.

SEC. 8. IMPLEMENTATION OF ANTITRUST MUTUAL ASSISTANCE AGREEMENTS.

(a) DETERMINATIONS.—The Attorney General may conduct an investigation under section 3, and the Attorney

General or the Commission may provide antitrust evidence to a foreign antitrust authority, under an antitrust mutual assistance agreement in effect under this Act only if the Attorney General or the Commission, as the case may be, determines in the particular instance in which such investigation or evidence is requested that—

(1) the foreign antitrust authority—

(A) will satisfy the assurances, terms, and conditions required by subparagraphs (A), (B), and (D) of section 12(2), and

(B) is capable of complying with and will comply with the confidentiality requirements applicable under such agreement to the requested antitrust evidence,

(2) providing the requested antitrust evidence will not violate section 5, and

(3) conducting such investigation, or providing the requested antitrust evidence, as the case may be, is consistent with the public interest of the United States, taking into consideration, among other factors, whether the foreign state, or the regional economic integration organization, represented by the foreign antitrust authority holds any proprietary interest that could benefit or otherwise be affected by

such investigation or by the provision of such antitrust evidence.

(b) LIMITATION ON DISCLOSURE OF CERTAIN ANTITRUST EVIDENCE.—Neither the Attorney General nor the Commission may disclose in violation of an antitrust mutual assistance agreement any antitrust evidence received under such agreement, except that such agreement may not prevent the disclosure of such antitrust evidence to a defendant in an action or proceeding brought by the Attorney General or the Commission for a violation of any of the Federal antitrust laws if such disclosure would otherwise be required by Federal law.

(c) REQUIRED DISCLOSURE OF NOTICE RECEIVED.—If the Attorney General or the Commission receives a notice described in section 12(2)(G), the Attorney General or the Commission, as the case may be, shall transmit such notice to the person that provided the evidence with respect to which such notice is received.

SEC. 9. LIMITATIONS ON JUDICIAL REVIEW

(a) DETERMINATIONS.—Determinations made under section 8(a) shall not be subject to judicial review.

(b) CITATIONS TO AND DESCRIPTIONS OF ANTITRUST LAWS.—Whether an antitrust mutual assistance agreement satisfies the requirements specified in section 12(2)(C) shall not be subject to judicial review.

SEC. 10. SUPPLEMENTATION AND PRESERVATION OF AUTHORITY.

(a) SUPPLEMENTAL AUTHORITY.—The authority provided by this Act is in addition to, and not in lieu of, any other authority vested in the Attorney General, the Commission, or any other officer of the United States.

(b) AUTHORITY PRESERVED.—This Act does not modify or affect the allocation of responsibility between the Attorney General and the Commission for the enforcement of the Federal antitrust laws.

SEC. 11. REPORT TO THE CONGRESS.

In the 30-day period beginning 3 years after the date of the enactment of this Act and after consultation with the Commission, the Attorney General shall submit, to the Speaker of the House of Representatives and the President pro tempore of the Senate, a report—

(1) describing how the operation of this Act has affected the enforcement of the Federal antitrust laws,

(2) the extent to which foreign antitrust authorities have complied with the confidentiality requirements applicable under antitrust mutual assistance agreements in effect under this Act,

(3) the number and identities of the foreign antitrust authorities that have entered into such agreements,

(4) the identity of each foreign state, and each regional economic integration organization, that has in effect a law similar to this Act,

(5) the approximate number of requests made by the Attorney General and the Commission under such agreements to foreign antitrust authorities for antitrust investigations and for antitrust evidence,

(6) the approximate number of requests made by foreign antitrust authorities under such agreements to the Attorney General and the Commission for investigations under section 3 and for antitrust evidence, and

(7) a description of any significant problems or concerns of which the Attorney General is aware with respect to the operation of this Act.

SEC. 12. DEFINITIONS.

For purposes of this Act:

(1) The term "antitrust evidence" means information, testimony, statements, documents, or other things obtained in anticipation of, or during the course of, an investigation or proceeding under any of the Federal antitrust laws or any of the foreign antitrust laws.

(2) The term "antitrust mutual assistance agreement" means a written agreement, or written

memorandum of understanding, that is entered between the Attorney General and a foreign antitrust authority for the purpose of conducting investigations under section 3, or for providing antitrust evidence, on a reciprocal basis and that includes the following:

(A) An assurance that the foreign antitrust authority will provide to the Attorney General or the Commission assistance that is comparable in scope to the assistance the Attorney General or the Commission, as the case may be, provides under such agreement or such memorandum.

(B) An assurance that the foreign antitrust authority is subject to laws and procedures that are adequate to maintain the confidentiality of antitrust evidence that may be received under section 2, 3, or 4 and will give protection to antitrust evidence received under such section that is not less than the protection provided under the laws of the United States to such antitrust evidence.

(C) Citations to, and brief descriptions of, the laws (including treaties, statutes, executive orders, and regulations) of the United States,

and the laws (including treaties, statutes, executive orders, and regulations) of the foreign state, or the regional economic integration organization, represented by the foreign antitrust authority, that protect the confidentiality of antitrust evidence that may be provided under such agreement or such memorandum. Such citations and such descriptions shall include the enforcement mechanisms and penalties applicable under such laws.

(D) Terms and conditions that specifically prohibit using antitrust evidence received under such agreement or such memorandum, for any purpose other than the administration or enforcement of the foreign antitrust laws involved.

(E) An assurance that antitrust evidence received under section 2, 3, or 4 from the Attorney General or the Commission, and all copies of such evidence, in the possession or control of the foreign antitrust authority will be returned to the Attorney General or the Commission, respectively, at the conclusion of the foreign investigation or proceeding with respect to which such evidence was so received.

(F) Terms and conditions that specifically provide that such agreement or such memorandum will be terminated if—

(i) the confidentiality required under such agreement or such memorandum is violated with respect to antitrust evidence, and

(ii) adequate action is not taken both to minimize any harm resulting from the violation and to ensure that such confidentiality is not violated again.

(G) Terms and conditions that specifically provide that if the confidentiality required under such agreement or such memorandum is violated by the foreign antitrust authority with respect to antitrust evidence, notice of the violation will be given—

(i) by the foreign antitrust authority promptly to the Attorney General or the Commission with respect to antitrust evidence provided by the Attorney General or the Commission, respectively, and

(ii) by the Attorney General or the Commission to the person (if any) that

provided such evidence to the Attorney General or the Commission.

(3) The term "Attorney General" means the Attorney General of the United States.

(4) The term "Commission" means the Federal Trade Commission.

(5) The term "Federal antitrust laws" has the meaning given the term "antitrust laws" in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)) but also includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition.

(6) The term "foreign antitrust authority" means a governmental entity of a foreign state or of a regional economic integration organization that is vested by such state or such organization with authority to enforce the foreign antitrust laws of such state or such organization.

(7) The term "foreign antitrust laws" means the laws of a foreign state, or of a regional economic integration organization, that are substantially similar to any of the Federal antitrust laws and that prohibit conduct similar to conduct prohibited under the Federal antitrust laws.

(8) The term "person" has the meaning given such term in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)).

(9) The term "regional economic integration organization" means an organization that is constituted by, and composed of, foreign states and in which such foreign states have vested authority to make decisions binding on such foreign states.

SEC. 13. AUTHORITY TO RECEIVE REIMBURSEMENTS.

The Attorney General and the Commission are authorized to receive from a foreign state or a regional economic integration organization reimbursement in cash or in kind for the costs incurred by the Attorney General or the Commission, respectively, to conduct investigations under section 3 or provide antitrust evidence under a mutual assistance agreement entered into with the foreign antitrust authority that represents such foreign state or such organization.

○

Additional Submissions for the Record

Committee To Support the Antitrust Laws,
317 Massachusetts Avenue NE., Suite 300,
Washington, DC, August 8, 1994.

The Hon. Howard M. Metzenbaum,
Chairman, Antitrust Subcommittee,
SR–140 Russell Senate Office Building,
Washington, DC.

Dear Senator Metzenbaum: The Committee to Support the Antitrust Laws ("COSAL"), strongly supports the International Antitrust Enforcement Act, S. 2297. We are very pleased that you have already held a hearing on this important measure and that the measure has attracted such wide, distinguished and bipartisan cosponsorship.

There are several reasons why this legislation is extremely important. First, as a fundamental philosophical matter, complex and sophisticated international anticompetitive arrangements have proliferated in the past three decades. One only needs to review modern industrial history to see several striking examples in the computer, ocean shipping, airlines, uranium, and insurance industries, just to name a few.

These examples frequently involve powerful international corporations with the political muscle to influence the activity of governments. A strong international recognition of the dangers of anti-competitive arrangements is essential to ensure that strong multinational corporations do not play nations off against one another in a "race to the bottom".

For years, many of our trading partners seemed less inclined than the United States to recognize the dangers of anti-competitive agreements. Some nations passed so-called "blocking" and "clawback" statutes that, far from promoting international antitrust enforcement, seemed to inhibit it.

Recent years have witnessed tremendous progress in the recognition of the importance of competition principles particularly within the European community. S. 2297 would foster the growing spirit of cooperation.

More specifically, because commercial relations cross international borders as easily as they formerly crossed state lines, a strong international web of cooperation among enforcement agencies to enforce the law against any anti-competitive conduct is now absolutely essential. Many of our trading partners have been reluctant to exchange information with U.S. antitrust enforcement authorities. S. 2297 would clear the way for important information sharing agreements.

We hope that your Committee report on this legislation would recognize the values of the information sharing in the antitrust context in general. Specifically, we believe that the Congress—through your report—should encourage the Antitrust Division and the Federal Trade Commission to share information not only with foreign governments, but with the Attorneys General of the various states as well as with private attorneys general, both of whom shoulder a tremendous responsibility within the antitrust laws. It would be ironic indeed, if the Department of Justice and the Federal Trade Commission were willing to share information with foreign powers that they were not willing to share to the fullest extent permitted by law with the Attorneys General of the States of the United States as well as private litigants.

During the Reagan and Bush years, there was a marked decline in the willingness of the United States antitrust authorities to share information. We believe that this was an unfortunate trend. We believe that S. 2997 provides a significant opportunity for Congressional reversal of that trend.

Please do not hesitate to contact me with any questions.

With best regards.

Sincerely,

Jonathan W. Cuneo.

APPLE COMPUTER, INC.,
20525 Mariani Avenue,
Cupertino, CA, August 3, 1994.

The Hon. HOWARD M. METZENBAUM,
U.S. Senate, 140 Russell Buliding,
Washington, DC.

DEAR SENATOR METZENBAUM: Apple Computers Inc. offers this letter in support of Senate Bill 2297, to be known as the International Antitrust Enforcement Assistance Act of 1994. The Bill demonstrates a commitment to policing conduct in the global marketplace by fashioning methods to obtain foreign-located antitrust evidence. This Bill is of vital importance to the integrity of the global marketplace in which more and more companies compete in a variety of industries.

Jack E. Brown joins Apple Computer, Inc. in its support for Senate Bill 2297 and for the attention given to these important issues by Attorney General Janet Reno and her outstanding staff. If I can provide any further endorsement to this Bill, please do not hesitate to call.

Sincerely,

MICHAEL J. ASSAD,
Acting Senior Counsel, Outside Litigation.

CHRYSLER MOTORS CORPORATION,
12000 Chrysler Drive,
Highland Park, MI, August 4, 1994.

Hon. HOWARD M. METZENBAUM,
Chairman, Antitrust Subcommittee,
Senate Judiciary Committee, U.S. Senate,
Washington, DC.

DEAR CHAIRMAN METZENBAUM: Chrysler Corporation is pleased to offer comments on S. 2297, the International Antitrust Assistance Act of 1994 (the Act). In essence, the Act would make it easier for our government to secure evidence of foreign antitrust conspiracies that harm U.S. consumers and businesses. It would authorize the Department of justice and the Federal Trade Commission to enter into reciprocal agreements with their foreign counterparts to obtain evidence of antitrust activities that can only be found abroad. We believe the Bill would provide an essential tool for ensuring more even-handed enforcement of competition laws world-wide, and we fully support the proposed legislation.

This Committee is well aware of the obstacles faced by U.S. businesses in gaining access to and being able to compete freely in many major overseas markets. Numerous hearings have been held in recent years in both houses of Congress on legislative pro-posals designed to provide remedies for companies harmed by the anti-competitive conduct of foreign competitors. There is ample documentation in Committee archives from our industry and many others of the kinds of collusive practices by foreign producers that have prevented or seriously hampered U.S. exports overseas. We believe the Act could have a salutary impact on two fronts: (1) strengthening the enforceability of U.S. laws that prohibit the closing of foreign markets, and (2) inspiring a more activist posture on the part of foreign antitrust enforcers through cooperative enforcement projects with our antitrust agencies.

The one concern that naturally arises in any discussion of reciprocal access agreements is the fair treatment of confiden-tial business data. U.S. businesses routinely furnish voluminous proprietary Information to the government under a variety of regulatory statutes. This is not the case with most foreign governments which not only require very little data from the business community, but also have less of an arm's-length rela-tionship with business than exists in our country.

S. 2297 has several provisions to safeguard against the improper accessing of such information. In addition to the exemptions for Hart-Scott-Rodino data, the Act would require that the Attorney General determine, for each agreement, that the recipient would provide comparable information to the United States and that it had in place confidentiality protections at least as stringent as those in the United States. These safe-guards are essential to ensuring that U.S. business is not disadvantaged by the more comprehensive enforcement regime in this country.

We believe that S. 2297 effectively reconciles the require-ments for effective international antitrust enforcement with the need to maintain proper Controls over ac-

cess to confidential business data, and we would be pleased to provide any further information that the Committee may need in considering this important legislation.

Very truly yours,

LEWIS H. GOLDFARB,
Assistant General Counsel.

Hon. HOWARD M. METZENBAUM, Chairman,
Hon. STROM THURMOND, Ranking Member,
Senate Committee on the Judiciary,
Subcommittee on Antitrust, Monopolies
and Business Rights.

DEAR CHAIRMAN METZENBAUM AND SENATOR THURMOND: We are writing to express our support for vigorous antitrust enforcement against foreign anticompetitive practices. A variety of tools will be necessary to combat these practices. To this end, we support strong and effective U.S. trade laws (Section 301), a Multilateral Steel Agreement prohibiting anticompetitive practices, and enlisting foreign antitrust authorities to work together with U.S. antitrust and trade officials to root out these practices. In this context, and as elaborated on below, S. 2297, the "International Antitrust Enforcement Assistance Act of 1994," deserves favorable consideration.

The American steel industry will benefit from improved antitrust enforcement globally. S. 2297, if enacted and properly implemented, is designed to enhance our antitrust authorities' access to information gathered by their foreign counterparts by giving them something to offer in return. This exchange of information could benefit U.S. industry both at home and in foreign markets.

Cartel activities affecting international steel trade are well known and well documented. Steel trade is currently characterized by foreclosure of goods from foreign markets, giving rise to dumping and diversion of trade which injures the U.S. industry. Foreign anticompetitive practices cause the United States to be a focal point for global excess capacity in steel.

U.S. Government action against foreign cartels where appropriate, and vigorous efforts to improve competition law enforcement abroad, should continue to be an important part of the antitrust agenda of both the Administration and the Congressional committees of jurisdiction.

Two considerations which should be weighed very carefully by the Committee are the need for confidential treatment of the information obtained by U.S. antitrust authorities and whether the U.S. public interest is served by providing any assistance. Both issues are addressed in Section 8 of the proposed bill. It is important that S. 2297 be crafted for implementation in a balanced manner, ensuring that confidential information is not used to harass U.S. companies and that foreign enforcement authorities abide by the letter and spirit of information exchange agreements. Foreign governmental interests and policies will often be at variance from those of the United States, and foreign competition authorities' ability to provide satisfactory assurances of confidential treatment will vary. This will be a particular problem in the steel sector where foreign steel companies are in many cases owned by foreign governments. Especially in cases of this kind, safeguards must exist to protect the confidentiality of information, including making provision for notice to and comment by domestic firms which are affected. The Committees should focus on these concerns in considering this bill and provide for continued oversight in its implementation.

We appreciate your attention to these remarks as you consider S. 2297.

Sincerely,

DONALD M. LAWS, COUNSEL
U.S. Steel Group,
a unit of USX Corp.

WILLIAM H. GRAHAM,
GENERAL COUNSEL,
Bethlehem Steel Corp.

DAVID B. ANDERSON,
GENERAL COUNSEL,
Inland Steel Industries, Inc.

○

ISBN 0-16-052494-6